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Judge-Advocate-General

THE

USE OF THE ARMY

IN

AID OF THE CIVIL POWER.

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JUDGE-ADVOCATE GENERAL,
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WAR DEPARTMENT.

Document No. 64.

OFFICE OF THE JUDGE-ADVOCATE GENERAL.

THE USE OF THE ARMY IN AID OF THE CIVIL POWER.

By the use of the Army in aid of the civil power is here meant its use under some power granted by the Constitution of the United States, either directly or through the medium of legislation. "War powers," independent of the Constitution, whatever they may be, and whether legislative or executive, are no part of this subject.[1] The use here spoken of has reference to the occasions for the employment of the Army, that is, to the purposes for which it may be used, and not to what it may do in carrying out the use. The occasions had in view are those of resistance to the law not amounting to war, and the subject to which these observations will be more especially addressed is the employment of the Army in executing the laws of the United States and in protecting their instrumentalities of government against unlawful interference.

The Army Appropriation Act of June 18, 1878, contained the following provision:

"From and after the passage of this act it shall not be lawful to employ any part of the Army of the United States, as a *posse comitatus*, or otherwise, for the purpose of executing the laws, except in such cases and under such circumstances as such employment of

[1] The North American Review for November, 1896, publishes the writer's views on what constitutes the justification of the war power known as "martial law." The position is there taken that martial law is defensible only as an exercise of executive military power founded in actual necessity, thus disagreeing with the view, sometimes advanced, that it is within the power of Congress to authorize it.

said force may be expressly authorized by the Constitution or by act of Congress; and no money appropriated by this act shall be used to pay any of the expenses incurred in the employment of any troops in violation of this section and any person wilfully violating the provisions of this section shall be deemed guilty of a misdemeanor and on conviction thereof shall be punished by a fine not exceeding ten thousand dollars or imprisonment not exceeding two years or by both such fine and imprisonment."

From June 30th until November 21st, 1877, the Army of the United States was maintained without any appropriation, the two Houses of Congress having failed to agree. It would be foreign to the purpose of these remarks to comment on this significant fact in our constitutional history, but the proceedings in Congress which led to the failure of the Army Appropriation Act at the second session of the Forty-fourth Congress, and those which resulted in the above legislation, are part of the history of the subject under consideration.

On the 22d of January, 1877, the President, in response to a resolution of the House of Representatives, made the following communication:

"To the HOUSE OF REPRESENTATIVES:

"On the 9th day of December, 1876, the following resolution of the House of Representatives was received, viz:

"'*Resolved*, That the President be requested, if not incompatible with the public interest, to transmit to this House copies of any and all orders or directions emanating from him or from either of the Executive Departments of the Government to any military commander or civil officer, with reference to the service of

the Army, or any portion thereof, in the States of Virginia, South Carolina, Louisiana, and Florida, since the 1st of August last, together with reports, by telegraph or otherwise, from either or any of said military commanders or civil officers.'

"It was immediately, or soon thereafter, referred to the Secretary of War and the Attorney General, the custodians of all retained copies of 'orders or directions' given by the Executive Department of the Government covered by the above inquiry, together with all information upon which such 'orders or directions' were given.

"The information, it will be observed, is voluminous, and, with the limited clerical force in the Department of Justice, has consumed the time up to the present. Many of the communications accompanying this have been already made public in connection with messages heretofore sent to Congress. This class of information includes the important documents received from the governor of South Carolina, and sent to Congress with my message on the subject of the Hamburgh massacre; also the documents accompanying my response to the resolution of the House of Representatives in regard to the soldiers stationed at Petersburgh.

"There have also come to me and to the Department of Justice, from time to time, other earnest written communications from persons holding public trusts and from others residing in the South, some of which I append hereto as bearing upon the precarious condition of the public peace in those States. These communications I have reason to regard as made by respectable and responsible men. Many of them deprecate the publication of their names as involving danger to them personally.

"The reports heretofore made by committees of Congress of the results of their inquiries in Mississippi and in Louisiana, and the newspapers of several States recommending 'the Mississippi plan,' have also furnished important data for estimating the danger to the public peace and order in those States.

"It is enough to say that these different kinds and sources of evidence have left no doubt whatever in my mind that intimidation has been used, and actual violence, to an extent requiring the aid of the United States Government, where it was practicable to furnish such aid, in South Carolina, in Florida, and in Louisiana, as well as in Mississippi, in Alabama, and in Georgia.

"The troops of the United States have been but sparingly used, and in no case so as to interfere with the free exercise of the right of suffrage. Very few troops were available for the purpose of preventing or suppressing the violence and intimidation existing in the States above named. In no case except that of South Carolina was the number of soldiers in any State increased in anticipation of the election, saving that twenty-four men and an officer were sent from Fort Foote to Petersburgh, Va., where disturbances were threatened prior to the election.

"No troops were stationed at the voting-places. In Florida and in Louisiana, respectively, the small number of soldiers already in the said States were stationed at such points in each State as were most threatened with violence, where they might be available as a *posse* for the officer whose duty it was to preserve the peace and prevent intimidation of voters. Such a disposition of the troops seemed to me reasonable, and justified by law and precedent, while its omission would have been inconsistent with the constitutional duty of the President of the United States 'to take care that the laws be faithfully executed.' The statute expressly forbids the bringing of troops to the polls, 'except where it is necessary to keep the peace,' implying that to keep the peace it may be done. But this even, so far as I am advised, has not in any case been done. The stationing of a company or part of a company in the vicinity, where they would be available to prevent riot, has been the only use made of troops prior to and at the time of the elections. Where so stationed, they could be called, in

an emergency requiring it, by a marshal or deputy marshal as a *posse* to aid in suppressing unlawful violence. The evidence which has come to me has left me no ground to doubt that if there had been more military force available, it would have been my duty to have disposed of it in several States with a view to the prevention of the violence and intimidation which have undoubtedly contributed to the defeat of the election law in Mississippi, Alabama, and Georgia, as well as in South Carolina, Louisiana, and Florida.

"By Article IV, section 4, of the Constitution, 'The United States shall guarantee to every State in this Union a republican form of government, and on application of the legislature, or of the executive (when the legislature can not be convened), shall protect each of them against domestic violence.'

"By act of Congress (Rev. Stat., U. S., sec. 1034, 1035) the President, in case of 'insurrection in any State,' or of 'unlawful obstruction to the enforcement of the laws of the United States by the ordinary course of judicial proceedings,' or whenever 'domestic violence in any State so obstructs the execution of the laws thereof, and of the United States, as to deprive any portion of the people of such State' of their civil or political rights, is authorized to employ such parts of the land and naval forces as he may deem necessary to enforce the execution of the laws and preserve the peace, and sustain the authority of the State and of the United States. Acting under this title (69) of the Revised Statutes, United States, I accompanied the sending of troops to South Carolina with a proclamation such as is therein prescribed.

"The President is also authorized by act of Congress 'to employ such part of the land or naval forces of the United States' * * * 'as shall be necessary to prevent the violation and to enforce the due execution of the provisions' of title 24 of the Revised Statutes of the United States for the protection of the civil rights of citizens, among which is the provision against conspiracies 'to prevent by force, intimidation,

or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner toward or in favor of the election of any lawfully qualified person as an elector for President, or Vice-President, or as a member of Congress of the United States.' (Rev. Stat., U. S., 1989.)

"In cases falling under this title, I have not considered it necessary to issue a proclamation to preclude or accompany the employment of such part of the Army as seemed to be necessary.

"In case of insurrection against a State government, or against the Government of the United States, a proclamation is appropriate; but in keeping the peace of the United States at an election at which members of Congress are elected, no such call from the State or proclamation by the President is prescribed by statute or required by precedent.

"In the case of South Carolina, insurrection and domestic violence against the State government were clearly shown, and the application of the governor founded thereon was duly presented, and I could not deny his constitutional request without abandoning my duty as the Executive of the National Government.

"The companies stationed in the other States have been employed to secure the better execution of the laws of the United States and to preserve the peace of the United States.

"After the election had been had, and where violence was apprehended by which the returns from the counties and precincts might be destroyed, troops were ordered to the State of Florida, and those already in Louisiana were ordered to the points in greatest danger of violence.

"I have not employed troops on slight occasions, nor in any case where it has not been necessary to the enforcement of the laws of the United States. In this I have been guided by the Constitution and the laws which have been enacted and the precedents which have been formed under it.

"It has been necessary to employ troops occasionally to overcome resistance to the internal-revenue laws,

from the time of the resistance to the collection of the whisky tax in Pennsylvania, under Washington, to the present time.

"In 1854, when it was apprehended that resistance would be made in Boston to the seizure and return to his master of a fugitive slave, the troops there stationed were employed to enforce the master's right under the Constitution, and troops stationed at New York were ordered to be in readiness to go to Boston if it should prove to be necessary.

"In 1859, when John Brown with a small number of men made his attack upon Harper's Ferry, the President ordered United States troops to assist in the apprehension and suppression of him and his party, without a formal call of the legislature or governor of Virginia, and without proclamation of the President.

"Without citing further instances, in which the Executive has exercised his power as commander of the Army and Navy to prevent or suppress resistance to the laws of the United States, or where he has exercised like authority in obedience to a call from a State to suppress insurrection, I desire to assure both Congress and the country that it has been my purpose to administer the executive powers of the Government fairly, and in no instance to disregard or transcend the limits of the Constitution.

"U. S. GRANT."

The bill passed by the House of Representatives at the second session of the Forty-fourth Congress proposed to reduce the numerical strength of the Army and to prevent its use in support of the claims, or pretended claims, of any State government or officer, until such government should be duly recognized by Congress. The reason assigned for this was the improper use of the Army in the Southern States. Thus, Mr. J. D. C. Atkins, a member from Tennessee, said:

"Had the people been allowed without Federal coercion to manage their own affairs since the war,

they would have done so much more justly to all concerned and with far greater satisfaction to a very large majority of the people even of the Northern States.

"The disrupted condition of society which the war left among other evils as a heritage to the South, and which almost always follows civil wars from necessity, afforded a pretext for the use of the Army in those States. And as the dominant party determined to tear down the old State governments and also the new ones which were set up by President Johnson and enter upon its famous and ill-advised reconstruction policy—and I only speak of it now for the purpose of a historical illustration—and to do this were compelled to inaugurate the rotten-borough or carpet-bag system of representation and government, which required, or they supposed it did, the presence of the Army to make it successful, time, partial success, and habit have rendered the use of the Army in the Southern States a seeming necessity to the ruling authorities at Washington. It is to this use of the Army that I object. It is degrading to the dignity of an American soldier to make a policeman of him; it is insulting to his chivalry and patriotism, it is dwarfing his noble profession to the ignoble level of a Turkish Janizary, who never tasted the sweet waters of liberty, but was born and bred beneath the frowning shadows of despotism and thinks it an honor to lick the hand of his master, or but touch the hem of his garment, or die for his defense.

"American soldiers policemen! Insult if true, and slander if pretended to cover up the tyrannical and unconstitutional use of the Army by protecting and keeping in power tyrants whom the people have not elected; and but for Federal military protection their governments would fall at the first breath of popular expression. The hollow insincerity and circumlocution which have attended every step of the unconstitutional use of the United States Army deserves the scorching denunciation of every true soldier and of every lover of his country and of its Constitution.

"The process has been to first stifle the lawful will of the people and set up in power these minions of despotism. This has been done by driving at the point of the bayonet the legally elected legislators and officers of those States from power. United States district judges have been invoked to violate the law and issue orders wholly illegal and unconstitutional, under which pretended judicial authority these unpardonable outrages upon civil liberty have been committed. In this manner these pretenders becoming the *de facto* governments, the President then virtuously and patriotically responds to their call for troops to protect them in their infamous assumption of authority. When this point is reached the law-abiding Executive, full of devotion to the Constitution and with a heart always yearning for peace, panoplied with magisterial power, recurs to the fourth section of the fourth article of the Constitution with infinite satisfaction, and forthwith military aid is afforded the men whom he, in violation of the Constitution, first created with his own usurping hand. Such has been the process.

"The last section of this bill seems to me to be a very salutary one. It provides that no part of the money appropriated by it shall be used in any State to maintain the political power of any State government, but to leave the people of a State perfectly free to regulate their own affairs in their own way, subject to the Constitution of the United States."

A part of the remarks of another member, Mr. H. B. Banning, of Ohio, who also discussed the subject at considerable length, is given in Appendix A, under the heading, used by him, of "*The Object of Our Army.*"

And when the bill was before the Senate Mr. Bayard said:

"It is not merely the cost of the Army; it is the question of the *employment of the Army*. That is the cause of the deep feeling which pervades the people

of this country to-day, and which forms the chief difference between the two Houses of Congress in respect to the present bill. It is not worth while to attempt to disguise it; the fact is that a widespread belief exists that the Army of the country has been employed and is still being used for purposes dangerous to the liberties of the country. That forms the objection to the increase of the military establishment and forms the reasons for the reduction proposed by the Representatives of the people. I only speak of that which we all know, which the whole country knows, of the improper uses to which the Army has been put in certain States of the Union during the last few years.

"It is now apparent that the outgoing administration tardily admit this policy in the use of the Army to have been a serious mistake and it seems are taking steps to abandon it. We hear something of a similar suggestion, a faint adumbration of opinion, from the incoming administration that they are in accord with these last expressions of opinion on the part of the present administration. I sincerely hope this may be so. In my judgment it would have been wiser had the House of Representatives moved directly, not by way of lessening appropriations, but directly, for the repeal of all those war measures authorizing the use of the Army in the several States which have found place upon our statute books in the last fifteen years. The use of military force of the nation for the execution of the laws should certainly be the very last resort, and not, as of late years, the very first. I hope the day is near at hand when we shall repeal all this military legislation which has sprung up under a semi-revolutionary condition of affairs, and permit us to return where the Constitution intended our administration of government should be restricted, only to enforce laws by the military power as a last resort, and even when the military power was called in in aid of the civil power it was to be the militia of the States, and not the Army of the nation.

* * * * *

"After all, the cure for such evils must be in the public opinion of an intelligent and courageous people, and that public opinion will practically enforce itself upon the exigencies of the occasion. We know there were emergencies, ten or twelve years ago, which, thank heaven, no longer exist, and there can be no doubt that laws for which there was a pretext or a real cause at that time are no longer the meet and proper laws for a peace establishment. It is not the size of the Army, it is the *use* to which the Army is applied; it is the extraordinary laws under which the Army can be unjustly used and has been used. It is the repeal of those laws that I seek, in order that the country may be put *in statu quo ante bellum*. It is that the use of the military as an aid to civil power should be the very last resort in a government of laws, and that, under our system, where the laws are to be enforced in aid of the State, the State militia, and not the Army of the United States, should be called upon."

The Senate passed a substitute for the House bill, leaving the Army on its existing footing, and omitting the provision restricting its use. The House thereupon refused to concur in the amendments, and the bill failed to become a law; the Army Appropriation Act for the fiscal year ending June 30th, 1878, not being passed until November 21st, 1877.

Similar debates were had the next year. Mr. Wm. Kimmel, a member from Maryland, then very fully discussed the subject of the employment of the Army to execute the laws, and offered the following as an amendment to the Army Appropriation Act: "*Provided*, That from and after the passage of this act it shall not be lawful to use any part of the land or naval forces of the United States to execute the laws either as a *posse comitatus* or otherwise, except in such cases as may be expressly authorized by act of Congress"—

language substantially the same as that finally enacted, except in one important particular, namely, the recognition by the final enactment of the fact that there is self-acting authority in the Constitution for the employment of the Army. This clause received earnest consideration in the Senate, where it was amended so as to contain such recognition. "As a matter of course," said Mr. Windom, "you can not limit the power of the President as authorized and granted by the Constitution."

The debate was an interesting one, but too long to follow in detail.[1] An attempt was made to strike out the word "expressly," but that failed. But, manifestly, the clause, as enacted, recognizes the Constitution as a direct source of authority for the employment of the Army. This is a very important consideration in the construction of the legislation. And another matter of great importance is also to be observed with reference to it. The enactment prescribes that it shall be unlawful to employ any part of the Army as a *posse comitatus*, or otherwise, for the purpose of executing the laws, except when it is *expressly* authorized by the Constitution or by act of Congress. Now, it is evident that the word "expressly" can not be construed as placing a restriction on any constitutional power. If authority so to use the Army is included in a constitutional power, although it be not

[1] When the bill was reported from the conference committee, Mr. Hewitt, of New York, who had charge of it, said:

"Thus have we this day secured to the people of this country the same great protection against a standing army which cost a struggle of two hundred years for the Commons of England to secure for the British people."

A strong expression of the feeling existing at that time.

expressly named, it can not, of course, be taken away by legislation.[1] So that, so far as any such constitu-

[1] Ex-Attorney General Miller, in a letter to Attorney General Olney, dated July 11, 1894, said:

"Without assuming that what I may say or think is of any special value, I beg to say that what you have done and what you have said, so far as the same has been brought to my attention, in connection with the current strike and labor troubles, has my cordial commendation and is, as I think, entitled to the approval of all good citizens. That the President has the authority and that it is his duty to use the whole power of the Government for the enforcement of the laws of the United States seems to me to be axiomatic. It is made his duty to take care that the laws be faithfully executed. He is made Commander-in-Chief of the Army and Navy. In my judgment, the power thus conferred is given in order that he may execute the duty thus imposed. For this reason, I have always been of the opinion, and so advised President Harrison, that the *posse comitatus* statute, in so far as it attempted to restrict the President in using the Army for the enforcement of the laws, was invalid, because beyond the power of Congress; that it was no more competent by a statute to limit the power of the President, as Commander-in-Chief, to use the Army for the enforcement of the laws than it is competent to limit by statute the exercise of the pardoning or appointing power. Holding these views, I repeat that I have been gratified at the decision and vigor with which the President's power as Commander-in-Chief has been exercised, as I think I may justly assume, under your advice." (H. R. Doc. 9, Part 2, 54th Cong., 2d sess., p. 108.)

Pomeroy divides the executive attributes and functions under the Constitution into three classes, viz: First, those which are completely conferred by the terms of the organic law; secondly, those which depend upon some prior statute of Congress for the opportunities and occasions upon which they may be exercised; and, thirdly, those which depend upon some prior laws of Congress, not only for the opportunities and occasions for their exercise, but for their number, character, and scope. And he says: "So far as the President has executive functions directly conferred upon him, he is independent of Congress. It was never intended that the legislature should draw to itself the duty of administering the laws which it makes. There is danger, it can not be doubted, lest the Congress should trench upon the attributes of the Executive. This is not done by interfering with the class of powers first above stated (secs. 635, 636). The subject-matter of these powers lies so plainly beyond the sphere of the legislature, that any assertion of jurisdiction over them is hardly to be anticipated. The tendency, if it exist at all, is to control

tional power is concerned, the clause must be read as though the word "expressly" were omitted. Nor, indeed, would the enactment qualify future legislation, if it should be manifest that the intention of the later legislation is to confer the authority. But the intention would have to be very evident, because the presumption would be that the later legislation is intended to be controlled by the earlier.

Among the acts of Congress regarded as expressly authorizing the employment of the Army in executing the laws, was the act of February 25, 1865, embodied in section 2002 of the Revised Statutes, forbidding the use of troops at any place in a State where an election should be held, unless it should be necessary "to repel the armed enemies of the United States, or to keep the peace at the polls." In the Army Appropriation Act of June 23, 1879, it was prescribed that no money appropriated by the act should be used "for the subsistence, equipment, transportation, or compensation of any portion of the Army of the United States, to be used as a police force to keep the peace at the polls at any election held within any State." And the Army Appropriation Act of the following year contained a similar provision, with a proviso to the effect that nothing in it should be construed to prevent the use of troops "to protect against domestic violence in

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the President in the exercise of his functions of the second class (sec. 637); or to commit those of the third class (sec. 638) to subordinates, and to limit and restrain the President in any practical exercise over those subordinates, of his power to 'take care that the laws be faithfully executed.' I need hardly say that such legislation is opposed to the spirit of the organic law; and if it became general, would break down the independence of the Executive, and practically reduce the Government to a single political branch." (Pomeroy's Constitutional Law, 537, *et seq.*)

each of the States on application of the legislature thereof or of the executive when the legislature can not be convened." This legislation was adopted in view of the existing law, authorizing the use of troops to keep the peace at the polls.[1] The latter was expressly repealed February 8th, 1894.

The use of the Army as a *posse comitatus* has undoubtedly been, for the present, done away with by the legislation of 1878. The Constitution does not authorize its use in this way, and there is no act of Congress expressly authorizing it.[2] Formerly it was regarded as entirely legal that it should be so used. "The *posse comitatus*," said Attorney General Cushing, "comprises every person in the district or county above the age of fifteen years, whatever may be their occupation, whether civilians or not; and including the military of all denominations, militia, soldiers, marines, all of whom are alike bound to obey the commands of a sheriff or marshal. The fact that they are organized as military bodies, under the immediate command of their own officers, does not in any wise

[1] See President Hayes's messages of April 29, 1879, in regard to the Army Appropriation Act, and of May 12, 1879, in regard to a bill "to prohibit military interference at the polls."

[2] By section 1984, Revised Statutes, commissioners charged with certain duties under the Civil Rights legislation are empowered "to summon and call to their aid the bystanders or *posse comitatus* of the proper county, or such portion of the land or naval forces of the United States, or of the militia, as may be necessary to the performance of the duty with which they are charged." It will be noticed that the land and naval forces are here spoken of as quite distinct from the *posse comitatus*. It is also to be noticed that the occasions for the use of troops under this section have been greatly reduced by the repeal of the provisions of the Revised Statutes relating to crimes against the elective franchise. And in no case has the commissioner a direct control over the troops. This would be unconstitutional.

affect their legal character. They are still the *posse comitatus*. (XXI Parl. Hist., pp. 672, 688, per Lord Mansfield.)"[1] It is to be noticed that Mr. Cushing held that the military forces were bound to obey the commands of the sheriff, as well as those of the marshal, while Attorney General Devens seems to have been of the opinion that even the marshal had the right to summon them as a *posse comitatus* only when they could be spared.[2] Having in mind the independence, and freedom from interference by the States, of the instrumentalities of the Government of the United States, it would appear that the Army could never have been subject to the summons of the sheriff. But in view of the act of Congress of 1878, this question is not now of any practical importance.

Called forth by the use of the Army in the political affairs of the Southern States, the legislation of 1878 was given a very general effect, and entirely abolished its use as a *posse comitatus*—a very desirable result, it is believed. Further than this, it requires that when authority to use the Army in the execution of the laws is given by statute it shall be done in express terms. Legislation of this kind is found in an act of Congress of March 3d, 1807, now covered by the last clause of section 5297 of the Revised Statutes, authorizing the President, on application by the legislature, or governor if the legislature can not be convened, to use the land and naval forces to suppress an insurrection in any State against its government.

[1] 6 Opin. Atty. Gen., 473. See also 16 *id.*, 163; and the instructions of Attorneys General Evarts and Taft to United States marshals, of date August 20th, 1868, and September 7th, 1876, respectively.

[2] 16 Opin. Atty. Gen., 163.

The act of 1807 provided: "That in all cases of insurrection, or obstruction to the laws, either of the United States, or of any individual State or Territory, where it is lawful for the President of the United States to call forth the militia for the purpose of suppressing such insurrection, or of causing the laws to be duly executed, it shall be lawful for him to employ, for the same purposes, such part of the land or naval force of the United States, as shall be judged necessary, having first observed all the prerequisites of the law in that respect."

And the act of February 28th, 1795, "to provide for calling forth the militia to execute the laws of the Union," etc., provided: "That whenever the United States shall be invaded, or be in imminent danger of invasion from any foreign nation or Indian tribe, it shall be lawful for the President of the United States to call forth such number of the militia of the State, or States, most convenient to the place of danger, or scene of action, as he may judge necessary to repel such invasion, and to issue his orders for that purpose to such officer or officers of the militia as he shall think proper. And in case of an insurrection in any State, against the government thereof, it shall be lawful for the President of the United States, on application of the legislature of such State, or of the executive (when the legislature can not be convened), to call forth such number of the militia of any other State or States, as may be applied for, as he may judge sufficient to suppress such insurrection.

"*And* * * * whenever the laws of the United States shall be opposed, or the execution thereof obstructed, in any State, by combinations too power-

ful to be suppressed by the ordinary course of judicial proceedings, or by the powers vested in the marshals by this act, it shall be lawful for the President of the United States, to call forth the militia of such State, or of any other State or States, as may be necessary to suppress such combinations, and to cause the laws to be duly executed; and the use of militia so to be called forth may be continued, if necessary, until the expiration of thirty days after the commencement of the then next session of Congress."[1]

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[1]Attorney General Black, in an opinion dated November 20, 1860, and addressed to President Buchanan, said:

"By the act of 1807, you may employ such parts of the land and naval forces as you may judge necessary, for the purpose of causing the laws to be duly executed, in all cases where it is lawful to use the militia for the same purpose. By the act of 1795, the militia may be called forth 'whenever the laws of the United States shall be opposed, or the execution thereof obstructed in any State, by combinations too powerful to be suppressed by the ordinary course of judicial proceedings, or by the power vested in the marshals.' This imposes upon the President the sole responsibility of deciding whether the exigency has arisen which requires the use of military force, and in proportion to the magnitude of that responsibility will be his care not to overstep the limits of his legal and just authority.

"The laws referred to in the act of 1795 are manifestly those which are administered by the judges and executed by the ministerial officers of the courts for the punishment of crime against the United States, for the protection of rights claimed under the Federal Constitution and laws, and for the enforcement of such obligations as come within the cognizance of the Federal judiciary. To compel obedience to these laws the courts have authority to punish all who obstruct their regular administration, and the marshals and their deputies have the same powers as sheriffs and their deputies in the several States in executing the laws of the States. These are the ordinary means provided for the execution of the laws, and the whole spirit of our system is opposed to the employment of any other, except in cases of extreme necessity, arising out of great and unusual combinations against them. Their agency must continue to be used until their incapacity to cope with the power opposed to them shall be plainly demonstrated. It is only upon clear evidence to that effect that a military force can be called into the field. Even then, its operations

This last section was repealed by act of July 29, 1861, "to provide for the suppression of the rebellion

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must be purely defensive. It can suppress only such combinations as are found directly opposing the laws and obstructing the execution thereof. It can do no more than what might and ought to be done by a civil *posse*, if a civil *posse* could be raised large enough to meet the same opposition. On such occasions especially, the military power must be kept in strict subordination to the civil authority, since it is only in aid of the latter that the former can act at all."

On the 15th of April, 1861, President Lincoln issued a proclamation declaring that the laws of the United States were opposed, and their execution obstructed, in South Carolina, Georgia, Alabama, Florida, Mississippi, Louisiana, and Texas by combinations too powerful to be suppressed by the ordinary course of judicial proceedings, or by the powers vested in the marshals by law, and calling forth the militia, to the number of 75,000, to suppress said combinations, and to cause the laws to be duly executed.

And on the 3rd of May the President, by an assumption of power not vested in him by the Constitution, issued the following proclamation:

"Whereas existing exigencies demand immediate and adequate measures for the protection of the national Constitution and the preservation of the national Union by the suppression of the insurrectionary combinations now existing in several States for opposing the laws of the Union and obstructing the execution thereof, to which end a military force in addition to that called forth by my proclamation of the fifteenth day of April in the present year, appears to be indispensably necessary:

"Now, therefore, I, Abraham Lincoln, President of the United States, and Commander-in-Chief of the Army and Navy thereof, and of the militia of the several States when called into actual service, do hereby call into the service of the United States forty-two thousand and thirty-four volunteers, to serve for the period of three years unless sooner discharged, and to be mustered into service as infantry and cavalry. The proportions of each arm and the details of enrollment and organization will be made known through the Department of War.

"And I also direct that the regular army of the United States be increased by the addition of eight regiments of infantry, one regiment of cavalry, and one regiment of artillery, making altogether a maximum aggregate increase of twenty-two thousand seven hundred and fourteen, officers and enlisted men, the details of which increase will also be made known through the Department of War.

"And I further direct the enlistment for not less than one or more than three years, of eighteen thousand seamen, in addition

against and resistance to the laws of the United States," etc., in which there was enacted legislation[1]

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to the present force, for the naval service of the United States. The details of the enlistment and organization will be made known through the Department of the Navy.

"The call for volunteers, hereby made, and the direction for the increase of the regular army, and for the enlistment of seamen hereby given, together with the plan of organization adopted for the volunteers and for the regular forces hereby authorized, will be submitted to Congress as soon as assembled.

"In the meantime I earnestly invoke the cooperation of all good citizens in the measures hereby adopted, for the effectual suppression of unlawful violence, for the impartial enforcement of constitutional laws, and for the speediest possible restoration of peace and order, and, with these, of happiness and prosperity throughout the country."

[1] The following extract from a speech of Stephen A. Douglas, delivered in the Senate, March 15th, 1861, explains the necessity for this legislation; for if Stephen A. Douglas's view was correct, the President stood sorely in need of further power:

"But we are told that the President is going to enforce the laws in the seceded States. How? By calling out the militia and using the Army and Navy! These terms are used as freely and as flippantly as if we were in a military Government where martial law was the only rule of action, and the will of the monarch was the only law to the subject. Sir, the President can not use the Army, or the Navy, or the militia, for any purpose not authorized by law; and then he must do it in the manner, and only in the manner, prescribed by law. What is that? If there be an insurrection in any State against the laws and authorities thereof, the President can use the military to put it down only when called upon by the State legislature, if it be in session, or, if it can not be convened, by the governor. He can not interfere except when requested. If, on the contrary, the insurrection be against the laws of the United States instead of a State, then the President can use the military only as a *posse comitatus* in aid of the marshal in such cases as are so extreme that judicial authority and the power of the marshal can not put down the obstruction. The military can not be used in any case whatever except in aid of civil process to assist the marshal to execute a writ. I shall not quote the laws upon this subject; but if gentlemen will refer to the acts of 1795 and 1807, they will find that under the act of 1795 the militia only could be called out to aid in the enforcement of the laws when resisted to such an extent that the marshal could not overcome the obstruction. By the act of 1807, the President is authorized to use the Army and Navy to aid in enforcing the laws in all cases where it was before lawful to use the militia. Hence the military power, no matter whether Navy,

now transferred to the Revised Statutes as section 5298, viz:

"Whenever, by reason of unlawful obstructions, combinations, or assemblages of persons, or rebellion against the authority of the Government of the United States, it shall become impracticable, in the judgment of the President, to enforce, by the ordinary course of judicial proceedings, the laws of the United States within any State or Territory, it shall be lawful for the President to call forth the militia of any or all the States, and to employ such parts of the land and naval forces of the United States as he may deem necessary to enforce the faithful execution of the laws of the United States, or to suppress such rebellion, in whatever State or Territory thereof the laws of the United States may be forcibly opposed, or the execution thereof forcibly obstructed."

Of the legislation intended to invest the President with authority to make use of the Army in the execution of the laws this is the most frequently appealed to. In 1878, after the passage of the legislation of that year, above cited, Attorney General Devens gave his opinion that under section 5298 the President might use the Army to suppress "organized, armed and fortified resistance to the collection of internal revenue in Baxter County, Arkansas;"[1] and in the same year

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regulars, volunteers, or militia, can be used only in aid of the civil authorities.

"Now, sir, how are you going to create a case in one of these seceded States where the President would be authorized to call out the military? You must first procure a writ from the judge describing the crime; you must place that in the hands of the marshal, and he must meet such obstructions as render it impossible for him to execute it; and then, and not till then, can you call upon the military."

[1] 16 Opin. Atty. Gen., 162.

the President issued his proclamation warning all persons in the Territory of New Mexico to desist from the obstruction of the laws of the United States, which by reason of unlawful assemblages and combinations of persons in arms it had become impracticable to enforce by the ordinary course of judicial proceedings—such proclamation being by law required before the military forces could be used.

In 1882, it appearing that the enforcement of the laws in the Territory of Arizona was "obstructed and resisted to such a degree by powerful combinations of outlaws and criminals, with whom even some of the local officers are alleged to be in league, that a state of lawlessness bordering on anarchy may be said to prevail," Attorney General Brewster held that the contingency was amply provided for by section 5298.[1]

In 1889, Attorney General Miller, in an opinion relating to resistance to the enforcement of the laws in the Indian Territory, said that it was certainly competent for the President, under section 5298, to direct the military forces to render such aid to the marshal, upon his request, as might be necessary to enable him to maintain the peace and enforce the laws of the United States in the Territory.[2]

In 1892, the President issued a proclamation declaring that by reason of unlawful obstructions, combinations, and assemblages of persons, it had become impracticable to enforce by the ordinary course of judicial proceedings the laws of the United States within the District of Wyoming, the United States marshal being unable to execute the process of the

[1] 17 Opin. Atty. Gen., 333.
[2] 19 Opin. Atty. Gen., 293.

courts, and commanding all persons engaged in resistance to the laws and the process of the United States courts to disperse.'

On the 8th of July, 1894, the President issued the following proclamation:

"Whereas, by reason of unlawful obstructions, combinations and assemblages of persons, it has become impracticable in the judgment of the President to enforce by the ordinary course of judicial proceedings, the laws of the United States within the State of Illinois and especially in the city of Chicago within said State;

"And, whereas, for the purpose of enforcing the faithful execution of the laws of the United States and protecting its property and removing obstructions to the United States mails in the State and city aforesaid, the President has employed a part of the military forces of the United States;

"Now, therefore, I, Grover Cleveland, President of the United States, do hereby admonish all good citizens and all persons who may be or may come within the city and State aforesaid, against aiding, countenancing, encouraging, or taking any part in such unlawful obstructions, combinations and assemblages; and I hereby warn all persons engaged in or in any way connected with such unlawful obstructions, combinations and assemblages to disperse and retire peaceably to their respective abodes on or before twelve o'clock noon on the ninth day of July instant.

"Those who disregard this warning and persist in taking part with a riotous mob in forcibly resisting and obstructing the execution of the laws of the United

[1] See Winthrop's Military Law and Precedents, p. 1351.

States, or interfering with the functions of the Government or destroying or attempting to destroy the property belonging to the United States or under its protection, can not be regarded otherwise than as public enemies.

"Troops employed against such a riotous mob, will act with all the moderation and forbearance consistent with the accomplishment of the desired end; but the stern necessities that confront them will not with certainty permit discrimination between guilty participants and those who are mingled with them from curiosity and without criminal intent. The only safe course therefore for those not actually unlawfully participating is to abide at their homes, or at least not to be found in the neighborhood of riotous assemblages.

"While there will be no hesitation or vacillation in the decisive treatment of the guilty, this warning is especially intended to protect and save the innocent."

And on the 9th of July the President issued the following proclamation:

"Whereas, by reason of unlawful obstructions, combinations and assemblages of persons, it has become impracticable in the judgment of the President, to enforce by the ordinary course of judicial proceedings the laws of the United States at certain points and places within the States of North Dakota, Montana, Idaho, Washington, Wyoming, Colorado, and California and the Territories of Utah and New Mexico, and especially along the lines of such railways traversing said States and Territories as are military roads and post routes and are engaged in interstate commerce and in carrying United States mails;

"And, whereas, for the purpose of enforcing the faithful execution of the laws of the United States, and protecting property belonging to the United States or under its protection, and of preventing obstructions of the United States mails and of commerce between the States and Territories, and of securing to the United States the right guaranteed by law to the use of such roads for postal, military, naval, and other government service, the President has employed a part of the military forces of the United States;

"Now, therefore, I, Grover Cleveland, President of the United States, do hereby command all persons engaged in, or in any way connected with such unlawful obstructions, combinations and assemblages, to disperse and retire peaceably to their respective abodes on or before 3 o'clock in the afternoon, on the tenth day of July instant."

It deserves notice that, as appears by the proclamation of July 8th itself, the military forces were called into use before the proclamation was issued. Whenever, in the judgment of the President, it becomes necessary to use the military forces under the title of the Revised Statutes to which section 5298 belongs, he is required, by section 5300, to issue his proclamation commanding the insurgents to disperse and retire peaceably to their respective abodes within a limited time. But it might be that the object of the employment of troops would not be the dispersal of insurgents but the overcoming and arrest of persons violating and defying the laws and judicial proceedings of the United States, or the protection of the instrumentalities of the United States, such as its treasury or mails, and that the immediate use of the troops

would be necessary. This suggests the important question whether there is not authority for the use of the Army in the execution of the laws other than that which is derived from the Constitution through the medium of statutes.[1]

The Constitution of the United States requires that—

"The United States shall guarantee to every State[2]

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[1] The different acts of legislation authorizing the employment of troops in the enforcement of the laws are given in the Army regulations (Article LII); *Appendix B.* See also Davis's Military Laws, Chapter XXXVIII, and Winthrop's Military Law and Precedents, page 1347, *et seq.*

The act of 1878 and the constitutional and statutory provisions understood to be excepted from its prohibition were published to the Army in a general order from the headquarters of the Army, a provision of which required that applications for the use of troops should be forwarded for the action of the President. This was subsequently modified by the War Department in the following instructions to General Ord:

"In *an emergency* a commander is authorized to disregard the long communications through intermediate channels, and may telegraph direct to the Adjutant General.

"The *posse comitatus* law is not supposed to apply to repelling invasions of foreigners against United States territory, nor to protection of United States property against violence. As a citizen may defend his house against a robber, so the United States may defend its treasury, mails, etc., against lawless violence."

To which General Ord added:

"As it is impossible to protect United States property without protecting the officers in charge, in the view of the department commander the preceding paragraph authorizes the protection of an officer of the United States, civil or military, from violence by lawless bands, while in the execution of his office." (Circular No. 18, 1878, Department of Texas.)

In 1879, two officers of the Army were indicted in Texas for assisting the United States marshal with troops in arresting persons for violations of the revenue laws.

[2] The word "State," as here used, includes an organized Territory. At the time of the violent disorders in New Mexico, in 1878, the governor of the Territory applied to the President for protection, but the proclamation which was issued by the President shows that the use of troops was not based on this guaranty, but on the power given him by statute, to use the land and naval forces to enforce the execution of the laws of the United States, when by reason of unlawful obstructions, combinations

in this Union a republican form of government, and shall protect each of them against invasion; and on application of the legislature, or of the executive, (when the legislature cannot be convened,) against domestic violence."

There are here three guaranties—the guaranty of a republican form of government, the guaranty against invasion, and the guaranty against domestic violence. It is important to keep this in mind in considering who is meant by the United States, because it seems to have been too readily assumed that, with reference to each of these guaranties, "The United States" means Congress only, and that therefore Congress must give life to each of them by legislation. In the case of Texas *v.* White,[1] the Supreme Court held with reference to the government set up by the executive

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or assemblages of persons, or rebellion against the authority of the Government of the United States, it becomes impracticable to enforce the laws of the United States within any State or Territory by the ordinary course of judicial proceedings. It was at that time held that the word "State," as used in the guaranty clause, does not include a "Territory," but this view has not since then been adhered to. Thus, President Cleveland, on the 7th of November, 1885, issued his proclamation on the representation of the governor of the Territory of Washington that domestic violence existed in that Territory, etc., and on the 9th of February, 1886, he issued a similar proclamation, also on the application of the governor of the Territory of Washington. So, also, the governor of the Territory of Wyoming, having (in 1885) telegraphed to the Secretary of War, with reference to the brutal attack on the Chinese employed as miners by the Union Pacific Railway Company, that the county authorities were powerless, that the Territory had no militia, and that he had applied to General Howard, at Omaha, for military aid, he was informed that before it could be given he must make application to the President in the manner indicated in the Constitution.

The President in these cases evidently based his action on a construction of the word "State" sufficiently broad to include inchoate States or organized Territories.

See also Paschal's Ann. Const., p. 242.

[1] 7 Wallace, 700, 729.

department in Texas after the rebellion, and speaking of the guaranty clause of the Constitution, as follows:

"It is not important to review at length the measures which have been taken, under this power, by the executive and legislative departments of the National Government. It is proper, however, to observe that almost immediately after the cessation of organized hostilities, and while the war yet smoldered in Texas, the President of the United States issued his proclamation appointing a provisional governor for the State, and providing for the assembling of a convention, with a view to the reestablishment of a republican government, under an amended constitution, and to the restoration of the State to her proper constitutional relations. A convention was accordingly assembled, the constitution amended, elections held, and a State government, acknowledging its obligations to the Union, established.

"Whether the action then taken was, in all respects, warranted by the Constitution, it is not now necessary to determine. The power exercised by the President was supposed, doubtless, to be derived from his constitutional functions, as commander-in-chief; and, so long as the war continued, it can not be denied that he might institute temporary government within insurgent districts, occupied by the National forces, or take measures, in any State, for the restoration of State government faithful to the Union, employing, however, in such efforts, only such means and agents as were authorized by constitutional laws.

"But, the power to carry into effect the clause of guaranty is primarily a legislative power, and resides in Congress. 'Under the fourth article of the

Constitution, it rests with Congress to decide what government is the established one in a State. For, as the United States guarantee to each State a republican government, Congress must necessarily decide what government is established in the State, before it can determine whether it is republican or not.'

"This is the language of the late Chief Justice, speaking for this Court, in a case from Rhode Island,[1] arising from the organization of opposing governments in that State. And, we think that the principle sanctioned by it may be applied, with even more propriety, to the case of a State deprived of all rightful government, by revolutionary violence; though necessarily limited to cases where the rightful government is thus subverted, or in imminent danger of being overthrown by an opposing government, set up by force within the State.

"The action of the President must, therefore, be considered as provisional, and, in that light, it seems to have been regarded by Congress."

The period to which this decision relates was not one of normal conditions. It was a period following a war. And the locality to which it relates had been a State in rebellion. Under these circumstances, the immediate restoration of the Constitution to its full force was, doubtless, impossible. The power exercised by the President might, therefore, be justified on the ground of necessity—the necessity of establishing some temporary government—and this seems to have been in the minds of the Supreme Court. But their decision does not go to the extent of saying that under other conditions the President would not, in the

[1] Luther *v.* Borden, 7 Howard, 42.

absence of any action by Congress, have had devolved upon him a duty under the guaranty clause of the Constitution. That "the power to carry into effect the clause of guaranty is primarily a legislative power" is not questioned, but that "The United States," as that designation is used in the guaranty clause, means Congress only, and can never under any circumstances mean the President, is believed to be a quite untenable position, and does not seem to have been intended by the Supreme Court. The fact that the power is vested primarily in Congress is not equivalent to saying that it is vested exclusively there, and that therefore the President can have no power under this clause of the Constitution, even though Congress should fail to legislate.

Moreover, the Supreme Court, in the case of Texas *v.* White, was discussing the power of the President only as to one of the three guaranties—the guaranty of a republican form of government, and if we were to construe the language of the court to mean that Congress alone has jurisdiction, it would become a question whether we should apply the same principle to the guaranty against invasion and domestic violence. These three guaranties are in the same clause, and "The United States" are required to furnish them all. But it can not be said, nor would it be practicable, nor as to the guaranty against domestic violence historically true, that the guaranties against invasion and domestic violence are exclusively in the hands of Congress. To hold that would be to destroy the value of these guaranties. They are not limited in time to the sessions of Congress, but are intended to be effective at all times. Who, then, is to furnish the guaranty when Congress is not in session?

And, further, the power to furnish the protection guaranteed involves the power to command, which the President, as commander-in-chief, has over the military forces. Congress can not exercise this power, and therefore, in order that it shall be exercised, "The United States" must be held to apply to the President, as well as to Congress.

In the case of Luther *v.* Borden [1] it was said that it is not a judicial, but a political question whether a certain government is the duly constituted government of a State, and that under the guaranty clause of the Constitution it rests with Congress to decide what government is the established one in a State, and that as to that part of the clause which relates to domestic violence it also rests with Congress to determine upon the means proper to be adopted to fulfill the guaranty. It was held to be a political and not a judicial power. Congress might, it was said, if it had deemed it advisable, have placed it in the power of a court to decide when the contingency had happened which required the Federal Government to interfere. But Congress thought otherwise, and no doubt wisely; and by the act of February 28, 1795, provided, that "in case of any insurrection in any State against the government thereof, it shall be lawful for the President of the United States, on application of the legislature of such State or of the executive, when the legislature can not be convened, to call forth such number of the militia of any other State or States, as may be applied for, as he may judge sufficient to suppress such insurrection,"—thus giving to the President the power to decide whether the exigency has arisen upon which the Government of the United States is bound to interfere.

[1] 7 Howard, 1.

There was no question in this case as to whether, in the absence of any action by Congress, a duty might not under the guaranty clause devolve on the President. As one of the ways in which a republican government, once established in a State, may be endangered or set aside, Judge Cooley mentions the hostile action of some foreign power in taking military possession of the territory of the State and setting up some government therein not established by the people themselves. And in this connection it is to be remembered that the second guaranty is against invasion. But Congress has not authorized the President to employ the Army in repelling invasion. It has authorized him to call forth the militia, but has remained silent as to the Army. Can it be for any other reason than that he already has the power? Would it not have been an absurdity for Congress to have given the commander-in-chief of the Army permission to use it to repel invasion?[1]

[1] If, indeed, the use of the Army were to be limited to such purposes as might be designated by Congress, it would be a contemptibly impotent force, for it would be impossible for Congress to foresee all the conditions which might call for its use. But Congress has not attempted to do this. The every-day use of the Army is not even regulated by Congress, although this might, however imperfectly, be done by legislation. It has been wisely left to the control of the commander-in-chief. If the use of the Army were absolutely dependent on the designation by Congress of the purposes for which it may be employed, it could not even protect all the property of the United States under its charge, for Congress has not made it its duty to do so, except in certain special cases. But, to create an army is to create it for the *ordinary* purposes for which armies are used, and the power of the President as commander-in-chief to use it for such purposes can not be questioned. The object of the legislation of 1878 was to place restrictions on the use of the Army in "executing the laws," but this had reference only to the ordinary civil and criminal laws of the land. It was not intended to place any restriction on its use for ordinary military purposes. The Army is all the time used for purposes not prescribed by Congress, and the President is doing this by virtue of his power as commander-in-chief.

By the Constitution, said Mr. Justice Grier, in the Prize Cases (2 Black., 635), Congress alone has the power to declare a national or foreign war. It cannot declare war against a State, or any number of States, by virtue of any clause in the Constitution. The Constitution confers on the President the whole executive power. He is bound to take care that the laws be faithfully executed. He is commander-in-chief of the Army and Navy of the United States, and of the militia of the several States when called into the actual service of the United States. He has no power to initiate or declare a war either against a foreign nation or a domestic State. But by the acts of Congress of February 28th, 1795, and 3d of March, 1807, he is authorized to call out the militia and use the military and naval forces of the United States in case of invasion by foreign nations,[1] and to suppress insurrections against the government of a State or of the United States. If a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force. He does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority. And whether the hostile party be a foreign invader, or States organized in rebellion, it is none the less a war, although the declaration of it be "*unilateral.*" Lord Stowell (1 Dodson, 247) observes, "It is not the less a war on *that account*, for war may exist without a declaration on either side. It is so laid down by the best writers on the law of nations. A declaration of war by one country only,

[1] This, however, is a mistake. The legislation of 1795 related only to calling out the militia, and that of 1807, which did provide for the employment of the land and naval forces, made no mention of repelling invasion, but provided only for the suppression of insurrection and obstruction to the laws.

is not a mere challenge to be accepted or refused at pleasure by the other." The battles of Palo Alto and Resaca de la Palma had been fought before the passage of the act of Congress of May 13th, 1846, which recognized "*a state of war as existing by the act of the republic of Mexico.*" This act not only provided for the future prosecution of the war, but was itself a vindication and ratification of the act of the President in accepting the challenge without a previous formal declaration of war by Congress.

Under the Constitution the legislative and executive branches of the Government sometimes have the power to act in the same subject-matter. This was discussed in remarks, elsewhere made,[1] on the source of authority of the Army Regulations, with reference to which it was pointed out that, although Congress, under its power "to make rules for the government and regulation of the land and naval forces," has primarily the authority to cover the whole field of Army Regulations, yet, subject to this power, the President, as commander-in-chief, has a jurisdiction over the same subject-matter—as repeatedly recognized by the Supreme Court. So that, in the absence of legislation regulating any matter of army administration, the President's power is effective. The guaranty clause makes it the duty of the United States to guarantee, not only a republican form of government, but against invasion, and, on the application of the State, against domestic violence. Of course Congress can materially aid, and, to a great extent, control these guaranties by its legislation, but, if it should fail to legislate, would the constitutional obligation of the United States be

[1] Remarks on the Army Regulations and Executive Regulations in General, Government Printing Office, 1898.

any the less? And if the President has the actual power to give this constitutional protection, will it not, in case of the failure of Congress to furnish it, rest with him to do so? His power and duty seem clear, but he must of necessity exercise his discretion in determining the existence of the conditions demanding this protection. He can not delegate his discretion to the legislatures or executives of States, and thus become a volitionless instrument in their hands.

But the guaranty clause of the Constitution is not the only constitutional provision which clothes the Executive with the power to use force in the execution of law. If his power were limited to what this clause empowers the Federal Government to do, it would be inadequate for some of the purposes for which it may be required. It is a guaranty to the States of a republican form of government and against invasion and domestic violence, but it does not vest the Federal Executive with the power to enforce the laws of the United States. This power, if it exists at all as a power derived directly from the Constitution, must be found elsewhere in that instrument. By the Constitution, the "executive power is vested in a President of the United States of America," whose duty it is made to "take care that the laws be faithfully executed." Can it be said that the duty thus imposed is lifeless, without the help of Congress, because the Constitution has not given him a corresponding power?

In the Neagle case[1] the Supreme Court say:

"The Constitution, section 3, Article II, declares that the President 'shall take care that the laws be

[1] 135 U. S., 1.

faithfully executed,' and he is provided with the means of fulfilling this obligation by his authority to commission all the officers of the United States, and, by and with the advice and consent of the Senate, to appoint the most important of them and to fill vacancies. He is declared to be commander-in-chief of the Army and Navy of the United States. The duties which are thus imposed upon him he is further enabled to perform by the recognition in the Constitution, and the creation by acts of Congress, of executive departments, which have varied in number from four or five to seven or eight, the heads of which are familiarly called cabinet ministers. These aid him in the performance of the great duties of his office, and represent him in a thousand acts to which it can hardly be supposed his personal attention is called, and thus he is enabled to fulfill the duty of his great department, expressed in the phrase that 'he shall take care that the laws be faithfully executed.'

"Is this duty limited to the enforcement of acts of Congress or of treaties of the United States according to their *express terms*, or does it include the rights, duties, and obligations growing out of the Constitution itself, our international relations, and all the protection implied by the nature of the government under the Constitution?"

And, illustrating these remarks, the Supreme Court refer to the Martin Koszta case and ask, Upon what act of Congress then existing can anyone lay his finger in support of the action of our Government in this matter? and, Who can doubt the authority of the President to protect the mail, "whether it be by soldiers of the Army or by marshals of the United

States?" and, Has he no power, in the absence of legislation by Congress, of protecting the public lands from depredation?

The court say that they can not doubt the power of the President to take measures for the protection of a judge of one of the courts of the United States, who, while in the discharge of the duties of his office, is threatened with a personal attack which may probably result in his death, and that they think it clear that where this protection is to be afforded through the civil power, the Department of Justice is the proper one to set in motion the necessary means of protection. "That there is," say the court, "a peace of the United States; that a man assaulting a judge of the United States while in the discharge of his duties violates that peace; that in such case the marshal of the United States stands in the same relation to the peace of the United States which the sheriff of the county does to the peace of the State of California; are questions too clear to need argument to prove them."

And in *Ex parte* Siebold the same court said:[1]

"It is argued that the preservation of peace and good order in society is not within the powers confided to the Government of the United States, but belongs exclusively to the States. Here again we are met with the theory that the Government of the United States does not rest upon the soil and territory of the country. We think that this theory is founded on an entire misconception of the nature and powers of that Government. We hold it to be an incontrovertible principle, that the Government of the

[1] 100 U.S., 394.

United States may, by means of physical force, exercised through its official agents, execute on every foot of American soil the powers and functions that belong to it. This necessarily involves the power to command obedience to its laws, and hence the power to keep the peace to that extent."

The Supreme Court was not here speaking of the President's power to use the Army in aid of the civil power in the execution of the laws. But, it being his duty to take care that the laws are faithfully executed, does not what the court say lead us to the recognition of his power to resort to the other means which the Constitution has placed in his hands for enforcing obedience to the laws of the United States when the civil power fails? "The power and duty imposed on the President to 'take care that the laws are faithfully executed,' necessarily carries with it all power and authority necessary to accomplish the object sought to be attained."[1] "Where the law directs a thing to be done without saying how, that implies the power to use such means as may be necessary and proper to accomplish the end of the legislature."[2]

In the case of Logan *v.* United States,[3] the Supreme Court held that a citizen of the United States, in the custody of a United States marshal under a lawful commitment to answer for an offense against the United States, has the right to be protected by the United States against lawless violence; that this right is secured to him by the Constitution and the laws of the United States; and that a conspiracy to injure or

[1] U. S. Cir. Court, in the Neagle case, 39 Fed. Rep., 833.
[2] Attorney General Black, 9 Opin., 519.
[3] 144 U. S., 263.

oppress him in its free exercise or enjoyment is punishable under section 5508 of the Revised Statutes. The court said that every right, created by, arising under, or dependent upon, the Constitution of the United States, may be protected and enforced by Congress by such means and in such manner as Congress, in the correlative duty of protection, or of the legislative powers conferred upon it by the Constitution, may in its discretion deem most eligible and best adapted to attain the object; that in the case at bar, the right in question did not depend upon any of the amendments of the Constitution, but arose out of the creation and establishment by the Constitution itself of a national government, paramount and supreme within its sphere of action; that any government which has power to indict, try and punish for crime, and to arrest the accused and hold them in safe-keeping until trial, must have the power and the duty to protect against unlawful interference its prisoners so held, as well as its executive and judicial officers charged with keeping and trying them.

And the court cite the decisions in the Neagle and Siebold cases, in the former of which, say the court, "it was held that, although there was no express act of Congress authorizing the appointment of a deputy marshal or other officer to attend a justice of this court while traveling in his circuit, and to protect him against assault or injury, it was within the power and duty of the Executive Department to protect a judge of any of the courts of the United States, when there was just reason to believe that he would be in personal danger while executing the duties of his office;" and in the latter of which cases it was held

"to be an incontrovertible principle, that the government of the United States may, by means of physical force, exercised through its official agents, execute on every foot of American soil the powers and functions that belong to it."

And, again, the Supreme Court say:

"If all the inhabitants of a State, or even a great body of them, should combine to obstruct interstate commerce or the transportation of the mails, prosecutions for such offences had in such a community would be doomed in advance to failure. And if the certainty of such failure was known, and the National Government had no other way to enforce the freedom of interstate commerce and the transportation of the mails than by prosecution and punishment for interference therewith, the whole interests of the nation in these respects would be at the absolute mercy of a portion of the inhabitants of that single State.

"But there is no such impotency in the National Government. The entire strength of the nation may be used to enforce in any part of the land the full and free exercise of all national powers and the security of all rights entrusted by the Constitution to its cares. The strong arm of the National Government may be put forth to brush away all obstructions to the freedom of interstate commerce or the transportation of the mails. If the emergency arises, the Army of the nation, and all its militia, are at the service of the nation to compel obedience to its laws.

"But passing to the second question, is there no other alternative than the use of force on the part of the executive authorities whenever obstructions arise to the freedom of interstate commerce or the

transportation of the mails? Is the Army the only instrument by which rights of the public can be enforced and the peace of the nation preserved?"[1]

And Justice Brewer, delivering the opinion of the court, then proceeds to the consideration of the power of the courts to remove or restrain obstructions to the passage of interstate commerce and the carrying of the mails.

So, when the enactment of 1878 was under discussion in the Senate, Mr. Edmunds said: "It is a rather singular statute to pass, to say that the Army of the United States shall not be used for the purpose of executing the laws—that is, of course, the laws of the United States—under any circumstances unless specifically authorized by an act of Congress or the Constitution. Now take the Constitution first; the Constitution says that the President of the United States shall be commander-in-chief of the Army and Navy; it says in the next place that he shall take care that the laws are faithfully executed; that is, all laws. Then the question at once arises whether under the Constitution of the United States, saying no more, it being the duty of the President to take care that the laws are faithfully executed and he being commander-in-chief of the Army, the Constitution does not expressly authorize him to use the Army whenever power is lawfully to be required to execute the laws."

And President Cleveland, replying, July 5th, 1894, to Governor Altgeld's protest[2] against his use of United States troops in Chicago, said:

"Federal troops were sent to Chicago in strict accordance with the Constitution and laws of the

[1] *In re* Debs, 158 U. S., 581.

[2] Appendix C.

United States, upon the demand of the Post Office Department that obstruction of the mails should be removed, and upon the representations of the judicial officers of the United States that the process of the Federal Courts could not be executed through the ordinary means, and upon competent proof that conspiracies existed against commerce between the States. To meet these conditions, which are clearly within the province of Federal authority, the presence of Federal troops in the city of Chicago was deemed not only proper, but necessary, and there has been no intention of thereby interfering with the plain duty of the local authorities to preserve the peace of the city."

The course pursued at this time, under instructions from the Attorney General, was to file a bill in equity for an injunction against any combination in restraint of interstate commerce, or interference with the performance of the duties of railroads as common carriers under the interstate commerce act, or conspiracy to obstruct or retard the passage of United States mails or the operation of the regular trains carrying them, that might exist, and, when such restraining order was not enforcible by the marshal in the ordinary manner, to enforce it by the military power of the Government, on certification of the facts to the authorities at Washington. Troops, when thus used, were not under the marshal, nor a part of the marshal's force or posse, but were a substitute therefor, and were under the command of the military officer in charge, to be used for the purposes named.[1]

[1] See correspondence relative to the Chicago disorders, published as an Appendix to the Annual Report of the Attorney General, for 1896. — H. R. Doc. No. 9, part 2, 54th Cong., 2d sess., pp. 20, 24, 193, etc.

But it may happen that the use of troops will be required in anticipation of forcible resistance to the law, which, if it should reach that stage, they might be employed in putting down. Their mere presence, for the purpose of overawing the lawless and preventing the commission of the unlawful act, may be very desirable. It is, of course, better to prevent the crime than to wait until it is committed and injury is done. Unquestionably the Government has a right to protect itself in this way. It would, indeed, be absurd to say that although, when the execution of the laws is obstructed by organized resistance too powerful to suppress by the ordinary course of law, the Army may be used in aid of the civil power, nevertheless it may not be used in such a way as, by its presence, to render unnecessary a resort to force against lawbreakers. Is the Government so impotent that it must wait for the crime to be committed, its instrumentalities obstructed, its property destroyed, before it can act? May it not protect its instrumentalities and property against a threatened danger, by the simple presence of the military power? It has often happened that the presence of a military force has had this effect, and it does not seem possible to doubt that it may lawfully be used for such purpose. We are not here speaking of its active use in aid of any civil process, but simply of the protection which the mere fact of its presence gives to instrumentalities and property of the United States which the United States has the right to protect. This right of protecting by the presence of troops undoubtedly exists, equally with the right to use active force when the resistance to the law makes it necessary. It is an exercise of the same

power—the power to take care that the laws are faithfully executed—which the Supreme Court recognized in the Neagle case as authorizing the use of means, not expressly provided by statute, for the protection of its justices travelling on circuit. The power to use the Army to give protection by its presence is, indeed, inseparable from the power to protect by active force. It would not exist without the latter.

In a recent (1897) case troops were used at the Tongue River Indian Agency, in Montana, for the purpose of escorting a sheriff with an Indian prisoner, charged with murder, from the agency to the railway, some distance off, there being reason to fear that the settlers in the neighborhood would take him from the sheriff and lynch him. This was done by the military commander on the spot, without any express authority for such use of the troops. It was a case where the presence of the troops, or a show of force, was used to protect a prisoner, who had surrendered to the military authority and had been transferred to the civil authority, against a great danger, and until it was past. Who will say that the military commander exceeded his authority ?[1]

It was at one time suggested to the Attorney General that if the mob in Chicago should again seriously

[1] The Army Regulations prescribe that, if time will admit, applications for the use of troops must be forwarded for the consideration and action of the President, but in case of sudden and unexpected invasion, insurrection, or riot, endangering the public property of the United States, or in case of attempted or threatened robbery or interruption of the United States mails, or other equivalent emergency so imminent as to render it dangerous to await instructions requested through the speediest means of communication, an officer of the Army may take such action before the receipt of instructions as the circumstances of the case and the law under which he is acting may justify.

interfere and prevent the enforcement of the United States laws, martial law should be proclaimed. But he, evidently, did not believe that this could be done under the existing circumstances, although he seems to have been of the opinion that the United States could proclaim martial law if the governor of Illinois should invoke Federal aid and thus put the United States in complete control of the situation.[1] "Martial law," however, is not anything that is provided for by the Constitution. It is founded in necessity, attendant on the fact of war. When opposition to the laws of the United States amounts to war, there will be a justification for martial law in the locality of the war or where it is necessary. But when the opposition falls short of war, the use of the military power under the authority of the Constitution and the laws would be limited, as it was in 1894, to the purpose of removing the particular obstruction which has sprung up, and enforcing the laws obstructed. "Martial law" means much more than this. When martial law prevails, the civil power is superseded by the military power; the military power becomes supreme; the safeguards of the Bill of Rights of the Constitution are for the time being set aside; and the civilian may be tried by military commission. This would not be the military power acting in aid of the civil power. Nor would the conditions existing in 1894 have been a justification for it. Only a condition of war would be. "When the regular course of justice is interrupted by revolt, rebellion, or insurrection, so that the courts of justice can not be kept open, civil war exists, and hostilities may be prosecuted on

[1] See page 77 of the publication named in note 1, p. 44, *ante*.

the same footing as if those opposing the Government were foreign enemies invading the land."[1] But when the military power is acting under the Constition in aid of the civil power, and the opposition to the law is not of such a character that war exists, the civil power is still supreme, and the rule of war can not be applied.[2]

[1] The Prize Cases, 2 Black, 668; *Ex parte* Milligan, 4 Wall., 2; also North American Review, November, 1896, on The Justification of Martial Law.

[2] But, although the rule of war can not be applied so as to displace the civil power under such circumstances, these circumstances may give rise to emergencies justifying an exercise of power for which there would otherwise be no justification. When the Pennsylvania militia were called out in 1892 for the suppression of the Homestead riots, the understanding between the sheriff and the commander of the troops was that the troops would support the sheriff in the nature of a *posse comitatus*, but the commander was to retain entire command of them, to employ military methods in putting down opposition to the sheriff, and to use them in his own way; and he reserved to himself full liberty, subject to the approval of the commander-in-chief, to take such action in cases of emergency as circumstances might warrant.—(Annual report of Major General Snowden, commanding Division, N. G. P., 1892.)

In the charge of the Chief Justice of Pennsylvania to the jury in the case of Com. *v.* Hawkins and Streator, generally spoken of as the Iams case (Iams being a militiaman who had been punished without trial, on account of an exclamation he had made showing his sympathy with the rioters, and had thereupon prosecuted the military officers who had caused him to be so punished), he held that, under the circumstances, the relations between the officers and the soldiers under their command "were governed by the same rules that would prevail in case of actual war," the only difference being one arising out of the difference in surroundings, and which in the case at bar made it the duty of the jury to determine whether the officers ordering the punishment were actuated by improper motives; but that the jury had nothing to do with the question whether war actually existed between the armed body and the inhabitants surrounding them. The trial resulted in the acquittal of the defendants.

Commenting on this case, the commanding general of the Pennsylvania militia remarked, in his annual report for 1892, that, while it had been hoped that the court would affirm a plea to the jurisdiction, the result was highly satisfactory, since a full

Remarking on a passage in Russell on Crimes, where it is said that for private persons to make use of arms

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trial in open court showed the features of the case to have been greatly exaggerated to the community, and resulted in a verdict of acquittal at the hands of a jury of the county, and "the law as laid down justifies an officer in an emergency, in time of riot or rebellion, actual war, as this was, in using extreme measures to preserve discipline, when not actuated by malice but honestly exercising a conscientious judgment."

The facts in the Iams case would, under conditions admitting of a calmer examination, perhaps not have been held to create an emergency justifying the action taken, and the statement that the troops "were governed by the same rules that would prevail in case of actual war" seems to be an unnecessary view to take of the matter, and may be a misleading one. But that such conditions may produce emergencies justifying what would otherwise be arbitrary can scarcely be doubted.

The instructions given for the use of troops in certain localities in Alaska, in 1898, seem to be based on this principle. Instructions, of date, February 9, were as follows: "The troops are sent to the localities named in the interest of good order, and of the safety of the persons and property there and in the vicinity of those places, which the troops are expected to conserve. The force should be used with kindness and consideration and within the measure of the strict necessity of the occasions as they may arise. The President relies upon the firmness and wise discretion of the officers in command to accomplish the objects for which the troops are sent, with kindness and humanity, and the use of their forces lawfully and as little as is compatible with the duties assigned them."

Other instructions, of date, March 19, were as follows: "The Secretary of War has information that a mob has taken possession of the White Pass road built by George A. Brackett, of Minneapolis, and others. He desires that their rights be protected and mob violence suppressed."

The parts of Alaska where the troops were to be used being unprotected by an organized local civil government, it was evidently deemed necessary, in order that the localities named should not be handed over to lawlessness, that the government having jurisdiction over the territory should use the only means at its disposal to prevent the commission of crime. It must be regarded as a temporary measure, based on necessity, to which the legislation of 1878 was not applied.

The remarks of Mr. Justice Woodbury, in his dissenting opinion in the case of Luther *v.* Borden, 7 Howard, 78–83, are of interest in this connection.

At the time of the riots in Idaho, in 1892, the governor applied to the President for the protection guaranteed by the Constitu-

in suppressing riots would seem only proper against such riots as "savour of rebellion," Finlanson says that it brings the question to the verge of martial law,

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tion, and also issued a proclamation declaring the county, which was the locality of the trouble, to be in a state of insurrection and rebellion. Military aid was furnished by the President, and for a time the locality was under predominant military rule, although the civil power was not in fact entirely displaced. It was regarded as an enforcement of martial law, based on the fact, proclaimed by the governor, of the existence of insurrection and rebellion, that is, war. But when the domestic violence does not amount to insurrection or rebellion, the State's invocation of aid to suppress it would not justify a resort to martial law. This seems to have been understood and observed during the riots of 1877. Whether the domestic violence does in fact amount to insurrection or rebellion may sometimes be a very delicate and difficult question to decide, although in *Ex parte* Milligan, 4 Wall., 127, the Supreme Court declared that martial rule can never exist where the courts are open, and in the proper and unobstructed exercise of their jurisdiction.

If correctly reported in the newspapers, General Gobin, the commanding general of the militia sent to Hazelton, Pa., in September, 1897, in consequence of the troubles arising out of the miners' strike, declared that, in spite of the warrants issued for the arrest of the sheriff's deputies for the shooting of miners, no constables, nor any civil authority, would be permitted to arrest them; that the sheriff is an executive officer, whose duty is to preserve the peace; that he, General Gobin, and the troops, were subordinate to the sheriff, being engaged in helping him to perform that duty; and that, under these circumstances, he would not permit interference with the sheriff's officials. "In spite of this fine distinction," wrote the reporter, "the commander's decision on this point is accepted as superseding the civil authorities by the military power." This goes to show the legal difficulties that may arise. A publication on "The Organized Militia of the United States in 1897," by the Military Information Division of the Adjutant General's Office, contains an account of the use of the militia on this occasion.

For an interesting discussion of "The Status of the Militia in Time of Riot" see two articles on that subject in the Albany Law Journal of August 3d and 10th, 1878, by William M. Ivins.

A majority of the States have express provisions in their constitutions or statutes for calling out the militia "to execute the laws;" in others the power is given, although not in this specific language, some copying the Constitution of the United States in this respect, making the executive commander-in-chief, and requiring him "to take care that the laws be faithfully executed."

and recalls to mind the phrase used by the Attorney General in the case of the Lord George Gordon riots, when he advised the Crown to declare the tumults *rebellious*, in order to allow of the recourse to military force in attacking the rioters wherever they were found, and whether or not engaged in felonious outrage, which alone would justify it at common law. This, says Finlanson, shows the point of contact between the scope of common law and martial law, the one dealing with mere riot, and the other with rebellion so formidable as to amount to war and to require measures of war.[1]

What was advised by the Attorney General on the occasion of the Lord George Gordon riots was actually done by the governor of Idaho, during the riots of 1892, when he, by proclamation, declared a county, where the lawlessness existed, to be in insurrection and rebellion.

Owing, however, to our dual system of government the principles controlling this subject are in a great measure peculiar to this country. With the suppression of ordinary riots, not interfering with the execution of the laws of the United States, nor with the processes of the Federal courts, nor with the mails nor the property[2] of the United States, or, in general, with their instrumentalities of government,[3] the Federal

[1] Review of the Authorities as to the Repression of Riot or Rebellion, by W. F. Finlanson, p. 25.

[2] "Your right to take such measures as may seem to be necessary for the protection of the public property is very clear. * * * The right of defending the public property includes also the right of recapture after it has been unlawfully taken by another." (Attorney General Black to President Buchanan, 9 Opin., 520, 521.)

[3] In a letter to the Secretary of War, dated July 5th, 1894, the Attorney General said:

"I have the honor to acknowledge the receipt of copy of telegram to the Adjutant General of the United States Army, from

Government has in the first instance nothing to do. It is only when called on in the manner prescribed by

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Brigadier General Merritt, commanding the Department of the Dakota. The telegram shows that on the Northern Pacific Railroad, west of Fargo, no trains are running; that employees engaged by the company refuse to work unless adequate protection is afforded them; that the protection of the United States courts as now afforded does not, in the opinion of such employees, secure them against danger, and that in consequence of the circumstances above mentioned mail communication with Forts Keogh and Custer has been interrupted since June 25, and the commanding general is unable to make the usual bimonthly payments to his troops or to ship supplies to the military posts on the line of the Northern Pacific.

"By section 3 of the act of July 2, 1864 (13 Stat., 365), incorporating the Northern Pacific Railroad Company, it is declared that certain described public lands are granted to the company 'for the purpose of aiding in the construction of such railroad and telegraph line to the Pacific coast, and to secure the safe and speedy transportation of the mails, troops, and munitions of war, and public stores over the route of said line of railway.'

"By section 11 it is further enacted, 'That such Northern Pacific Railroad, or any part thereof, shall be a post route and a military road subject to the use of the United States for postal, military, naval, and all other Government service, and also subject to such regulations as Congress may impose restricting the charges for such Government transportation.'

"By section 20 of the same act Congress reserves the right to alter, amend, or repeal the act 'the better to accomplish the object of this act, namely, to promote the public interest and welfare by the construction of such railroad and telegraph line and keeping the same in working order and to secure to the Government at all times (but particularly in time of war) the use and benefits of the same for postal, military, and other purposes.'

"These provisions make the road of the Northern Pacific a military road of the United States. Being such, the power of the President, as commander-in-chief of the military forces of the United States, to keep the road unobstructed and available for military purposes can not be doubted, and may properly be used to remedy the mischiefs stated in General Merritt's telegram."

And the following letter was sent by the commanding general of the Army to the commanding general of the Department of the Columbia:

"In view of the fact, as substantiated by communications received from the Department of Justice, from military official reports, and from other reliable sources, that, by reason of unlaw-

the Constitution that it can interpose its power for the suppression of such domestic violence.

As at Chicago, the existence of the two governments, Federal and State, may lead to complications, under such conditions. The Federal military power, employed in aid of the Federal civil power, may find itself acting within a State contrary to the wishes of the State's executive. But that can only happen when the State's executive fails to recognize the fact that the Federal authority extends to every part of the United States, just as the State's authority extends to every part of the State, and that wherever in the United States the authority of the laws of the United States is resisted, to such place do their authority to enforce their laws extend. The United States have as full jurisdiction within a State for the execution of their laws, as the State has for the execution of its own. They are not there by sufferance, or comity,

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ful obstructions and combinations or assemblages of persons, it has become impracticable, in the judgment of the President, to enforce by the ordinary course of judicial proceedings the laws of the United States and to prevent obstructions of the United States mails and interruptions to commerce between the States, the right guaranteed by section 11 of the act approved July 2, 1864, constituting the Northern Pacific Railroad 'a post route and military road, subject to the use of the United States for postal, military, naval, and all other Government service,' you are directed by the President to employ the military force under your command to remove obstructions to the mails and to execute any orders of the United States court for the protection of property in the hands of receivers appointed by such court, and for preventing interruption of interstate commerce, and to give such protection to said railroad as will prevent any unlawful and forcible obstruction to the regular and orderly operation of said road 'for postal, military, naval, and all other Government service'."

Similar letters were sent to the commanding generals of the Departments of the Platte and of California for the protection of the Union Pacific and Central Pacific Railways. (H. R. Doc., No. 9, part 2, 54th Cong., 2d sess., pp. 226, 233.)

but as a constitutional right.[1] And if the resistance to the laws be of such a character that it can not be overcome in the ordinary way, the Federal Executive has as much right to use the Federal military power to subdue it, as the State's executive has to use the military power of the State to subdue a similar resistance to its own laws.

The President's use of the Army in the execution of the laws on the occasion of the Chicago strikes was commended by both the Senate and House of Representatives, in resolutions adopted by those bodies. The Senate resolution declared, "That the Senate indorses the prompt and vigorous measures adopted by the President of the United States and the members of his Administration to repulse and repress, by military force, the interference of lawless men with the due process of the laws of the United States, and with the transportation of the mails of the United States, and with commerce among the States.

"The action of the President and his Administration has the full sympathy and support of the law-abiding masses of the people of the United States, and he will be supported by all departments of the Government and by the power and resources of the entire nation."

And the resolution of the House of Representatives was as follows: "*Resolved*, That the House of Representatives indorses the prompt and vigorous efforts of the President and his Administration to suppress lawlessness, restore order, and prevent improper interference with the enforcement of the laws of the United States, and with the transportation of the mails of the United States and with interstate commerce; and

[1] *Ex parte* Siebold, 100 U. S., 394.

pledges the President hearty support, and deems the success that has already attended his efforts as cause for public and general congratulation."

These were very important resolutions, indicating, as they do, the understanding at that time of the two Houses of Congress with reference to the power of the President to use the military forces of the United States in the execution of the laws; although the understanding probably was that their use was pursuant to the statutory authority contained in the Revised Statutes. There was no question as to the source of the authority.

This use of Federal troops was, however, also in accord with the views of the Supreme Court in the Neagle case, as to the power of the President. Or, as it has been elsewhere expressed: "The President is, of course, to take care that the laws are faithfully executed. But how? By what means? Only by such means as the Constitution and laws themselves have given him power to employ. That is, by causing proceedings to be instituted according to law, against those who violate the law, and by employing whatever force may be necessary to overcome all resistance that is offered to their execution."[1]

The President's constitutional duty to take care that the laws are faithfully executed must be carried out by the means placed in his hands by or under the Constitution. If Congress does not prescribe means, he must use such means as the Constitution supplies him with. These means are not specifically set forth in the Constitution. They are incidental to and implied

[1] Paine, J., *In re* Kemp, 16 Wis., 414. See also Story, Const., secs. 1489–1493; and Kent's Commentaries, Vol. I, p. 282.

in his general powers. Nor is such a conclusion unauthorized by the character of the instrument. In the language of Chief Justice Marshall, "A constitution to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would probably never be understood by the public. Its nature, therefore, requires that only its great outlines should be marked, its important objects designated and the minor ingredients which compose those objects be deduced from the nature of the objects themselves. That this idea was entertained by the framers of the American Constitution is not only to be inferred from the nature of the instrument, but from the language."[1]

By the last clause of the legislation of 1878 it was prescribed that no money "appropriated by this act" should be used to pay the expenses incurred in the employment of any troops in violation of it. This provision related, of course, only to the period covered by the appropriation act in which it is found. Congress may, by disbanding the Army, render it impossible for the President to resort to his constitutional power as executive and commander-in-chief of employing the Army in aid of the civil power, in the execution of the laws, or may couple an appropriation for the support of the Army with a condition as to the use of the money appropriated; but, if it be true that the Constitution directly vests the President with the duty and power we have been discussing, it must follow

[1] McCulloch *v.* Md., 4 W., 407.

that Congress can not make the exercise of such power illegal. It may prevent its exercise, but it can not make it illegal.

The framers of the Constitution relied on the control of Congress over appropriations as the great safeguard against a misuse of the Army. It was believed that to refuse to vote supplies would be to disband the Army. We have seen that for a short time the Army has been maintained without such vote. But, nevertheless, this was the safeguard relied on, and there was no attempt to create another by investing Congress with direct control over the President in the discharge of his constitutional duty to take care that the laws be faithfully executed.

There is not now any fear of an abuse of this power. In the early days of our history a "standing army" was regarded with fear. It was natural that the framers of the Constitution, with their knowledge of the past and anxiety for the future, should have this fear. But, with our experience, is it reasonable?[1]

[1] Mr. Justice Miller, in his Lectures on the Constitution, says that the belief, which was entertained by some at the time of the adoption of the Constitution, that there was danger in the great power vested in the Executive, though natural enough at the time, was a very great mistake; that the nearer we approach to individual responsibility in the Executive, the nearer will it come to perfection; that of the three branches, the executive has been the most shorn of the powers granted it by the Constitution; and that of all the delusive ideas, or fallacies, that ever entered anybody's brain, the most unfounded is this—that any President can ever make himself a perpetual dictator, either in our time or generation or in those which are to come.

See also Foster's Commentaries on the Constitution, page 242, *et seq.*

A most remarkable encroachment on the constitutional powers of the President was the legislation contained in the second section of the Army Appropriation Act, of March 2, 1867, whereby it was prescribed:

"That the headquarters of the General of the Army of the United States shall be at the city of Washington, and all orders

What fair-minded man can now say that our standing Army is a menace, instead of a protection, to our institutions? Is not what Macaulay wrote applicable in substance to our condition also? "It was proved by experience that, in a well-constituted society, professional soldiers may be * * * submissive to the civil power. * * * It is perhaps because the army became thus gradually, and almost imperceptibly, one of the institutions of England, that it has acted in

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and instructions relating to military operations issued by the President or Secretary of War shall be issued through the General of the Army, and, in case of his inability, through the next in rank. The General of the Army shall not be removed, suspended, or relieved from command, or assigned to duty elsewhere than at said headquarters, except at his own request, without the previous approval of the Senate; and any orders or instructions relating to military operations issued contrary to the requirements of this section shall be null and void; and any officer who shall issue orders or instructions contrary to the provisions of this section shall be deemed guilty of a misdemeanor in office; and any officer of the Army who shall transmit, convey, or obey any orders or instructions so issued contrary to the provisions of this section, knowing that such orders were so issued, shall be liable to imprisonment for not less than two nor more than twenty years, upon conviction thereof in any court of competent jurisdiction."

This provision, although, as the President declared, it deprived him of his constitutional functions as commander-in-chief of the Army, he was compelled to countenance, or otherwise, by withholding his signature from the act, defeat necessary appropriations. But, while thus sanctioning it, he did not quietly submit to it. Thus we find him, by proclamation of September 3d, 1867, declaring that "all officers of the Army * * * of the United States, in accepting their commissions under the laws of Congress and the rules and articles of war, incur an obligation to observe, obey, and follow such directions as they shall from time to time receive from the President or the General, or other superior officers set over them, according to the rules and discipline of war," and enjoining upon officers of the Army (directly, and not through the medium of the commanding general of the Army,) to assist and sustain the courts and other civil authorities of the United States in a faithful administration of the laws thereof, and in the judgments, decrees, mandates, and processes of the courts of the United States. The legislation was repealed in 1870.

such perfect harmony with all her other institutions, has never once, during a hundred and sixty years, been untrue to the throne or disobedient to the law, has never once defied the tribunals or overawed the constituent bodies."

Such a spirit our Army has inherited. It has never questioned its subordination to the civil power in time of peace; but, on the contrary, it has been taught, in the language of the Army Regulations of 1825 (prepared by General Scott), that, "Respect and obedience to the civil authorities of the land, is the duty of all citizens, and more particularly of those who are armed in the public service."[1]

If there was reason for the legislation of 1878, in the use to which the Army had then been put by the Executive, it threatens us with no danger, because the conditions can not recur.

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[1] See also the Army Regulations of 1847.

APPENDIX A.

[Extract from the speech of Hon. H. B. Banning, delivered March 2, 1877, "The Object of Our Army."]

Mr. Speaker, there is a strange confusion in the minds of the people, shared by some eminent officials, as to what are the uses for which our regular Army was created and what the duties and responsibilities of the individual officer or private.

For the functions to be performed by the Army we must look to the "Constitution and the laws of the United States which shall be made in pursuance thereof," which are declared by Article VI of that instrument to be "the supreme law of the land."

We find in section 2 of Article II that—

"The President shall be commander-in-chief of the Army and Navy of the United States and of the militia of the several States when called into the actual service of the United States."

But as such commander-in-chief he has no other or further powers than such as may by act of Congress agreeably to the provisions of the Constitution be devolved upon him.

The power to declare war; to provide and maintain a navy; to make rules for the government and regulation of the land and naval forces; to provide for calling forth the militia to execute the laws of the Union, suppress insurrection, and repel invasions; to provide for organizing, arming, and disciplining the militia, etc., and all other powers connected with the Army and Navy except the single one before quoted are vested in the Congress of the United States. The Army can be used for national purposes to execute the laws of the Union, suppress insurrection, and repel invasions, and also aid the States, under section 4 of Article IV, "to protect each of them against invasion, and on application of the legislature, or of the executive when the legislature can not be convened, against domestic violence." The manner and occasion of such use, however, are not discretionary with the President as commander-in-chief, but are clearly defined by acts of Congress.

In relation to the use of the Army in the aid of the State governments, by the act of February 28, 1795, and March 3, 1807 (section 5297, Revised Statutes, United States), it is provided that—

"In case of an insurrection in any State against the government thereof it shall be lawful for the President, on application of the legislature of such State, or of the executive when the legislature can not be convened, to call for such number of the militia of any other State or States which may be applied for as he deems sufficient to suppress such insurrection; or, *on like application*, to employ for the same purposes such part of the land and naval forces of the United States as he deems necessary."

Section 5300, Revised Statutes, United States (act of February 28, 1795), provides that—

"Whenever in the judgment of the President it becomes necessary to use the military forces under this title the President shall forthwith, by proclamation, command the insurgents to disperse and retire peaceably to their respective abodes within a limited time."

The first occasion on which it became necessary to consider the propriety of exercising these most important constitutional and legal functions arose in the year 1842, under the administration of President Tyler, in the case of the Dorr rebellion in Rhode Island. Daniel Webster was then Secretary of State, and matters growing out of the relations between the Federal Government and the several States of the Union were conducted through the State Department. In those days the Attorney General of the United States was not claimed to be, as he now is, the virtual commander-in-chief of the Army. The circumstances of the case briefly stated are as follows:

In 1842 a large majority of the people of Rhode Island, acting outside of the forms of law, established a state government and elected Thomas W. Dorr their governor. On the 4th of April, 1842, Samuel W. King, legal governor of Rhode Island, addressed the President of the United States, stating that "the State of Rhode Island is *threatened with domestic violence*," that the legislature could not be convened, and calling upon the President

for "the protection which is required by the Constitution of the United States."

In another letter of the same date addressed to the President, Governor King recited the facts which led him to make the application for Federal assistance and requested that "such precautionary measures may be taken by the Government of the United States as may afford us that protection which the Constitution of the United States requires. * * * The Government of the United States has the power to prevent as well as to defend us from violence. The protection provided by the Constitution of the United States will not be effectual unless such precautionary measures may be taken as are necessary to prevent lawless men from breaking out into violence as well as to protect the State from further violence after it has broken out." President Tyler, in a communication prepared by Daniel Webster, declined to interfere. He said, "For the regulation of my conduct on any interposition which I may be called upon to make between the government of a State and any portion of the citizens who may assail it with domestic violence, or may be in actual insurrection against it, I can only look to the Constitution and laws of the United States, which plainly declare the obligations of the executive department, and leave it no alternative as to the course it shall pursue." After reciting section 4 of Article IV of the Constitution and the acts of 1795 and 1807, before quoted, he said:

"By a careful consideration of the above-recited acts of Congress your excellency will not fail to see that no power is vested in the Executive of the United States to anticipate insurrectionary movements against the government of Rhode Island, so as to sustain the interposition of the military authority; but that there must be an actual insurrection, manifested by lawless assemblages of the people or otherwise, to whom a proclamation may be addressed, and who may be required to betake themselves to their respective abodes."

On the 4th of May, 1842, the legislature of Rhode Island passed resolutions calling upon the President for assistance to suppress the insurrection against the State, and reciting that—

"A portion of the people of this State, for the purpose of subverting the laws and existing government thereof, have framed

a pretended constitution, and for the same unlawful purposes have met in lawless assemblages and elected officers for the future government of this State; and whereas the persons so elected, in violation of law, but in conformity to the said pretended constitution, have, on the 3d day of May instant, organized themselves into executive and legislative departments of government, and under oath assumed the duties and exercise of said powers; and whereas, in order to prevent the due execution of the laws, a strong military force was called out, and did array themselves to protect the said unlawful organization of government and to set at defiance the due enforcement of the laws."

Did the President then interfere? No, sir; he still declined, and in a letter dated May 7, gave the best of reasons for so doing. He says "that he has information that leads him to believe that the danger of domestic violence is hourly diminishing."

"I freely confess," he says—

"that I should experience great reluctance in employing the military power of this Government against any portion of the people; but, however painful the duty, I have to assure your excellency that if resistance be made to the execution of the laws of Rhode Island by such force as the civil posse shall be unable to overcome, it will be the duty of this Government to enforce the constitutional guarantee."

On the 9th of May, 1842, the President addressed Governor King of Rhode Island a letter, in which he counseled peaceful measures.

"Why urge matters," he says—

"to an extremity? If you succeed by the bayonet you succeed against your own fellow-citizens, and by the shedding of kindred blood. * * * A resort to force will engender for years to come feelings of animosity."

On the 25th of May Governor King addressed the President, stating that the Dorr government, in addition to companies of men in Rhode Island, was organizing bands of men in Massachusetts, Connecticut, and New York. Therefore Governor King asked for the interposition of the Federal authority, and that the President might place a sufficient body of troops in the State, "to be subject to the requisition of the executive of this State

whenever, in his opinion, the exigency of the case should require their assistance."

This request the President declined, in a letter dated the 28th of May, in which he said, "should the necessity of the case require the interposition of the authority of the United States, it will be rendered in the manner prescribed by the laws."

On the 29th of June the President of the United States being informed "that the difficulties in Rhode Island have arrived at a crisis" which require the interposition of Federal authority in support of the State, directed the Secretary of War to proceed to Rhode Island and in the event of the necessary requisition being made by the governor of Rhode Island to issue a proclamation prepared by Daniel Webster, Secretary of State, and signed by Webster and the President, "commanding all insurgents and all persons connected with the insurrection to disband." This proclamation, however, was never issued, the Dorr rebellion having been suppressed by the State authorities.

In compliance with a resolution of the House of Representatives of the 23d of March, 1844 (Executive Document No. 225), the President informed the House "that the Executive did not deem it his duty to interfere with the naval and military forces of the United States in the late disturbance in Rhode Island; that no orders were issued for the employment of troops in that State except to strengthen the garrison at Fort Adams; that no orders were given to any officer or officers of the Army or Navy to report themselves to the charter government; that the Executive was at no time convinced that the *casus fœderis* had arisen which required the interposition of the military or naval power."

Taking strong ground against the interference of the Executive in State questions, he said:

"Actuated by selfish motives he (the Executive) might become the great agitator, fomenting assault upon the State constitutions and declaring the majority of to-day to be the minority of to-morrow, and the minority in its turn the majority, before whose decrees the established order of things in the State should be subverted. Revolution, civil commotion, and bloodshed would be the inevitable consequences. The provision in the Constitution intended for the security of the States would thus be turned into the instrument of their destruction; the President would

become in fact the great constitution-maker for the States and all power would be vested in his hands."

It will be seen upon a thorough examination of this case that President Tyler, acting under the advice of Daniel Webster, denied the power of the Federal Government to interfere in a cause of merely "threatened domestic violence" or to "anticipate insurrectionary movements" against the State, but claimed that there must be an "actual insurrection" and "lawless assemblages to whom a proclamation may be addressed;" that resistance must first be made to the execution of the laws of the State by such force as the *civil posse* shall be unable to overcome; that he could not place any part of the Army of the United States subject to the orders of the State executive to be used whenever in his opinion the exigency of the case should require, and that a proclamation must first be addressed to the insurgents demanding them to disperse.

How different has been the practice under the present administration of our Government. At Columbia and New Orleans United States troops have been placed under the orders of State executives and of subordinate State officers without previous proclamations and without any lawless assemblages against whom to direct them. There has been a constant and persistent interference in State matters by the Army; State legislatures legally elected have been dispersed; troops have been used as a police to protect State returning boards in the perpetration of frauds, without any regard to the requirements of the acts of Congress regulating the manner and occasion of such interposition, and in defiance of law and the decisions of the highest tribunal in the land. The Army has been used as a State constabulary. In Louisiana to-day the Army of the United States is engaged in keeping the peace between two State governments, neither of which has been recognized by the President, and in inducting into office from time to time different State officers who have been removed from their offices, and their interference is continued, not upon the ground that either State government is the lawful one, but because the Army has been directed by the President to preserve the present chaotic condition of affairs in that State until he shall make up his mind which State government to recognize.

And yet, sir, the President, when called to an account for the use of troops in Louisiana, as far back as 1874, said in his message to Congress, dated January 13, 1875:

"I am well aware that any military interference by the officers or troops of the United States with the organization of a State legislature or any of its proceedings, or with any civil department of the Government, is repugnant to our ideas of government. I can conceive of no case not involving rebellion or insurrection where such interference by authority of the General Government ought to be permitted or can be justified."

Notwithstanding such expressions of opinion by the President, our Army, degraded from its high position of the defenders of the country from foreign and domestic foes, has been used as a police; has taken possession of polls and controlled elections; has been sent with fixed bayonets into the halls of State legislatures in time of peace and under the pretense of threatened outbreak; has been placed under the control of subordinate State officials, and, under the instructions of the Attorney General, has been notified to obey the orders of deputy United States marshals, "general and special," appointed in swarms to do dirty work in a presidential campaign. I call your attention to the late order of the Attorney General concerning the recent use of the Army during the elections, from which I quote the following paragraphs:

"In this connection I advise that you and each of your deputies, general and special, have a right to summon to your assistance in *preventing* and quelling disorder, every person in the district above fifteen years of age, whatever may be their occupation, whether civilians or not, and including the military of all denominations, militia soldiers, marines, all of whom are alike bound to obey you. The fact that they are organized as military bodies (whether of the State or of the United States), under the immediate command of their own officers, does not in any wise affect their legal character. They are still the *posse comitatus*. I prefer to quote the above statement of the law upon this point from an opinion of my predecessor, Attorney General Cushing, because it thus appears to have been well settled for many years. (6 Opin., 466; May 27, 1854.) I need hardly add that there can be no State law or State official in this country

who has jurisdiction to oppose you in discharging your official duties under the laws of the United States. If such interference shall take place (a thing not anticipated), you are to disregard it entirely. The laws of the United States are supreme, and so, consequently, is the action of officials of the United States in enforcing them. There is, as virtually you have already been told, no officer of a State whom you may not by a summons embody in your own posse, and any State posse already embodied by a sheriff will, with such sheriff, be obliged upon your summons to become a part of a United States posse, and obey you or your deputy acting *virtute offici.*"

The Attorney General based his authority for such use of the Army upon the opinion of Attorney General Cushing, given on the 27th of May, 1854, concerning the enforcement of the fugitive-slave law, an opinion questionable at best, but strangely perverted by the Attorney General. What Attorney General Cushing says is merely that being a soldier of the United States does not exempt a man from being called upon by the proper authorities to act like any other citizen as a part of a *posse comitatus.* He nowhere intimates that the soldier as a part of the Army or that the Army as such shall be used by a marshal in direct violation of the Constitution.

From this opinion of Attorney General Cushing, which, as I have said, the Attorney General strangely perverts, he draws the most extraordinary conclusions. Under his opinion issued as Order No. 96, any marshal of the United States, or deputy or special marshal, may, upon his own private judgment, order any officer, even the General of the Army, to obey his command.

The General of the Army seems to have held very different views, for in his order to the Army promulgating it he so modified this opinion of the Attorney General that he occupies precisely the same grounds that I advocate. I take pleasure in calling your attention to what he says. It reads as follows:

"The obligation of the military (individual officers and soldiers) in common with all citizens to obey the summons of a marshal or sheriff must be held subordinate to their paramount duty as members of a permanent military body. However, the troops can act only in their proper organized capacity, under their own officers, and in obedience to the immediate orders of those officers.

The officer commanding troops summoned to the aid of a marshal or sheriff must also judge for himself and upon his own official responsibility whether the service required of him is lawful and necessary and compatible with the proper discharge of his ordinary military duties, and must limit his action absolutely to proper aid in execution of the [l]awful precept exhibited to him by the marshal or sheriff."

This carefully worded instruction of General Sherman reminds one of the better days of the Republic.

Concerning the powers of the United States in connection with matters relating solely to the States, and not by the Constitution placed under the paramount control of the United States, it may not be amiss to refer to the decision of the Supreme Court of the United States in the case of Cruikshank, 2 Otto, page 542. Mr. Chief Justice Waite delivered the opinion of the court (declaring the enforcement act of 1870 unconstitutional), from which I quote the following paragraph, which will be found on page 556:

"Certainly it will not be claimed that the United States have the power or are required to do mere police duty in the States. If a State can not protect itself against domestic violence, the United States may, upon the call of the executive, when the legislature can not be convened, lend their assistance for that purpose. This is a guarantee of the Constitution (Article IV, section 4), but it applies to no case like this."

APPENDIX B.

[Army Regulations, Article LII.]

EMPLOYMENT OF TROOPS IN THE ENFORCEMENT OF THE LAWS.

486. It is unlawful to employ any part of the Army of the United States, as a posse comitatus or otherwise, for the purpose of executing the laws, except in such cases and under such circumstances as such employment of said force may be expressly authorized by the Constitution or by act of Congress; and any person willfully violating this provision will be deemed guilty of a misdemeanor, and, on conviction thereof, will be punishable by a fine not exceeding $10,000 or imprisonment not exceeding two years, or by both such fine and punishment.

487. The provisions of the Constitution and of acts of Congress understood as intended to be excepted from the operation of the preceding paragraph, authorizing the employment of the military forces for the purpose of executing the laws, are as follows:

ARTICLE IV OF THE CONSTITUTION.

"SEC. 4. The United States shall guarantee to every State in this Union a republican form of government, and shall protect each of them against invasion; and on application of the legislature, or of the executive, (when the legislature can not be convened,) against domestic violence."

REVISED STATUTES OF THE UNITED STATES.

CIVIL RIGHTS.

"SEC. 1984. The commissioners authorized to be appointed by the preceding section [sec. 1983] are empowered, within their respective counties, to appoint, in writing, under their hands, one or more suitable persons, from time to time, who shall execute all such warrants or other process as the commissioners may issue in the lawful performance of their duties, and the persons so appointed shall have authority to summon and call to their aid

the bystanders or posse comitatus of the proper county, or such portion of the land and naval forces of the United States, or of the militia, as may be necessary to the performance of the duty with which they are charged; and such warrants shall run and be executed anywhere in the State or Territory within which they are issued."[1]

"SEC. 1989. It shall be lawful for the President of the United States, or such person as he may empower for that purpose, to employ such part of the land or naval forces of the United States, or of the militia, as may be necessary to aid in the execution of judicial process issued under any of the preceding provisions, or as shall be necessary to prevent the violation and enforce the due execution of the provisions of this title."

"SEC. 1991. Every person in the military or civil service in the Territory of New Mexico shall aid in the enforcement of the preceding section (abolishing peonage)."

INDIANS.

"SEC. 2118. Every person who makes a settlement on any lands belonging, secured, or granted by treaty with the United States

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[1] Under section 1983 of the Revised Statutes the circuit courts of the United States and the district courts of the Territories, "from time to time, shall increase the number of commissioners, so as to afford a speedy and convenient means for the arrest and examination of persons charged with the crimes referred to in the preceding section [*i. e.*, those specified in chapter 7 of the title "Crimes"]; and such commissioners are authorized and required to exercise all the powers and duties conferred on them herein with regard to such offenses in like manner as they are authorized by law to exercise with regard to other offenses against the laws of the United States."

By the act of February 8, 1894 (28 Stats., 36), sections 5506, 5511–5515, and 5520–5523, of chapter 7 of the title "Crimes," relating to crimes against the "elective franchise," were repealed, leaving in force—

1. Sections 5507–5509, prohibiting the intimidation of voters by bribery or threats, and conspiracies to injure or intimidate citizens in the exercise of civil rights, and other crimes committed while violating these provisions.

2. Section 5510, prohibiting the depriving, under color of State laws, etc., inhabitants of civil rights on account of such inhabitants being aliens or by reason of their color or race.

3. Sections 5516 and 5517, in regard to obstructing the execution of process in "civil rights" cases, under sections 1984 and 1985, Revised Statutes; and marshal or deputy marshal refusing to receive warrant under the latter section or failing or neglecting to execute the same.

4. Sections 5518–5519, prohibiting conspiracies to prevent the accepting or holding office under the United States or depriving persons of the equal protection of the laws.

5. Sections 5524–5525, prohibiting kidnaping or enticing persons on board vessels with intent that such persons are to be held or sold into slavery and knowingly receiving such persons on vessels.

6. Sections 5526, 5527, and 5532, prohibiting the holding or returning of persons to peonage or obstructing the laws prohibiting peonage.

7. Sections 5528–5532, relative to officers of the Army or Navy intimidating voters, prescribing their qualification, interfering with officers of election, or having troops at election unless their presence be necessary to repel armed enemies or to keep the peace.

to any Indian tribe, or surveys or attempts to survey such lands, or to designate any of the boundaries by marking trees, or otherwise, is liable to a penalty of one thousand dollars. The President may, moreover, take such measures and employ such military force as he may judge necessary to remove any such person from the lands."

"SEC. 2147. The superintendent of Indian Affairs, and the Indian agents and subagents, shall have authority to remove from the Indian country all persons found therein contrary to law; and the President is authorized to direct the military force to be employed in such removal."

"SEC. 2150. The military forces of the United States may be employed in such manner and under such regulations as the President may direct—

"First. In the apprehension of every person who may be in the Indian country in violation of law; and in conveying him immediately from the Indian country, by the nearest convenient and safe route, to the civil authority of the Territory or judicial district in which such person shall be found, to be proceeded against in due course of law;

"Second. In the examination and seizure of stores, packages, and boats, authorized by law;

"Third. In preventing the introduction of persons and property into the Indian country contrary to law; which persons and property shall be proceeded against according to law;

"Fourth. And also in destroying and breaking up any distillery for manufacturing ardent spirits set up or continued within the Indian country."

"SEC. 2151. No person apprehended by military force under the preceding section shall be detained longer than five days after arrest and before removal. All officers and soldiers who may have any such person in custody shall treat him with all the humanity which the circumstances will permit."

"SEC. 2152. The superintendents, agents, and sub-agents shall endeavor to procure the arrest and trial of all Indians accused of committing any crime, offense, or misdemeanor, and of all other persons who may have committed crimes or offenses within any State or Territory, and have fled into the Indian country, either by demanding the same of the chiefs of the proper tribe, or by

such other means as the President may authorize. The President may direct the military force of the United States to be employed in the apprehension of such Indians, and also in preventing or terminating hostilities between any of the Indian tribes."

THE PUBLIC LANDS.

"SEC. 2460. The President is authorized to employ so much of the land and naval forces of the United States as may be necessary effectually to prevent the felling, cutting down, or other destruction of the timber of the United States in Florida, and to prevent the transportation or carrying away any such timber as may be already felled or cut down; and to take such other and further measures as may be deemed advisable for the preservation of the timber of the United States in Florida."

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That if any person or persons shall, after the passing of this act, take possession of, or make a settlement on any lands ceded or secured to the United States, by any treaty made with a foreign nation, or by a cession from any State to the United States, which lands shall not have been previously sold, ceded, or leased by the United States, or the claim to which lands, by such person or persons, shall not have been previously recognized and confirmed by the United States; or if any person or persons shall cause such lands to be thus occupied, taken possession of, or settled; or shall survey, or attempt to survey, or cause to be surveyed, any such lands; or designate any boundaries thereon, by marking trees, or otherwise, until thereto duly authorized by law, such offender or offenders shall forfeit all his or their right, title, and claim, if any he hath, or they have, of whatsoever nature or kind the same shall or may be, to the lands aforesaid, which he or they shall have taken possession of, or settled, or cause to be occupied, taken possession of, or settled, or which he or they shall have surveyed, or attempt to survey, or cause to be surveyed, or the boundaries thereof he or they shall have designated, or cause to be designated, by marking trees or otherwise. And it shall moreover be lawful for the President of the United States to direct the marshal, or officer acting as marshal, in the manner hereinafter directed, and also to take such other

measures, and to employ such military force as he may judge necessary and proper, to remove from lands ceded or secured to the United States by treaty or cession as aforesaid any person or persons who shall hereafter take possession of the same, or make, or attempt to make, a settlement thereon, until thereunto authorized by law. And every right, title, or claim forfeited under this act shall be taken and deemed to be vested in the United States, without any other or further proceedings: *Provided*, That nothing herein contained shall be construed to affect the right, title, or claim of any person to lands in the Territories of Orleans or Louisiana before the boards of commissioners established by the act entitled 'An act for ascertaining and adjusting the titles and claims to land within the Territory of Orleans and the District of Louisiana,' shall have made their reports and the decision of Congress been had thereon." (Section 1 of an act approved March 3, 1807, perpetuated by section 5596, Revised Statutes.)

THE PUBLIC HEALTH.

"SEC. 4792. The quarantines and other restraints established by the health laws of any State respecting any vessels arriving in, or bound to, any port or district thereof, shall be duly observed by the officers of the customs revenue of the United States, by the masters and crews of the several revenue cutters, and by the military officers commanding in any fort or station upon the seacoast; and all such officers of the United States shall faithfully aid in the execution of such quarantines and health laws, according to their respective powers and within their respective precincts, and as they shall be directed, from time to time, by the Secretary of the Treasury." * * *

EXTRADITION.

SEC. 5275. Whenever any person is delivered by any foreign government to an agent of the United States for the purpose of being brought within the United States and tried for any crime of which he is duly accused, the President shall have power to take all necessary measures for the transportation and safekeeping of such accused person, and for his security against lawless violence, until the final conclusion of his trial for the crimes or offenses specified in the warrant of extradition, and until his final discharge from custody or imprisonment for or on

account of such crimes or offenses, and for a reasonable time thereafter, and may employ such portion of the land or naval forces of the United States, or of the militia thereof, as may be necessary for the safe-keeping and protection of the accused."

NEUTRALITY.

"SEC. 5286. Every person who, within the territory or jurisdiction of the United States, begins or sets on foot, or provides or prepares the means for, any military expedition or enterprise, to be carried on from thence against the territory or dominions of any foreign prince or state, or of any colony, district, or people with whom the United States are at peace, shall be deemed guilty of a high misdemeanor, and shall be fined not exceeding three thousand dollars and imprisoned not more than three years."

"SEC. 5287 * * * In every case in which a vessel is fitted out and armed, or attempted to be fitted out and armed, or in which the force of any vessel of war, cruiser, or other armed vessel is increased or augmented, or in which any military expedition or enterprise is begun or set on foot, contrary to the provisions and prohibitions of this title; and in every case of the capture of a vessel within the jurisdiction or protection of the United States as before defined; and in every case in which any process issuing out of any court of the United States is disobeyed or resisted by any person having the custody of any vessel of war, cruiser, or other armed vessel of any foreign prince or state, or of any colony, district, or people, or of any subjects or citizens of any foreign prince or state, or of any colony, district, or people, it shall be lawful for the President, or such other person as he shall have empowered for that purpose, to employ such part of the land or naval forces of the United States or of the militia thereof for the purpose of taking possession of and detaining any such vessel, with her prizes, if any, in order to the execution of the prohibitions and penalties of this title, and to the restoring of such prizes in the cases in which restoration shall be adjudged, and also for the purpose of preventing the carrying on of any such expedition or enterprise from the territories or jurisdiction of the United States against the territories or dominions of any foreign prince or state, or of any colony, district, or people with whom the United States are at peace."

"SEC. 5288. It shall be lawful for the President, or such person as he shall empower for that purpose, to employ such part of the land or naval forces of the United States, or of the militia thereof, as shall be necessary to compel any foreign vessel to depart the United States in all cases in which, by the laws of nations or the treaties of the United States, she ought not to remain within the United States."

INSURRECTION.

"SEC. 5297. In case of an insurrection in any State against the government thereof, it shall be lawful for the President, on application of the legislature of such State, or of the executive, when the legislature can not be convened, to call forth such number of the militia of any other State or States, which may be applied for, as he deems sufficient to suppress such insurrection; or, on like application, to employ, for the same purposes, such part of the land or naval forces of the United States as he deems necessary."

"SEC. 5298. Whenever, by reason of unlawful obstructions, combinations, or assemblages of persons, or rebellion against the authority of the government of the United States, it shall become impracticable, in the judgment of the President, to enforce, by the ordinary course of judicial proceedings, the laws of the United States within any State or Territory, it shall be lawful for the President to call forth the militia of any or all the States, and to employ such parts of the land and naval forces of the United States, as he may deem necessary to enforce the faithful execution of the laws of the United States, or to suppress such rebellion, in whatever State or Territory thereof the laws of the United States may be forcibly opposed, or the execution thereof forcibly obstructed."

"SEC. 5299. Whenever insurrection, domestic violence, unlawful combinations, or conspiracies in any State so obstructs or hinders the execution of the laws thereof, and of the United States, as to deprive any portion or class of the people of such State of any of the rights, privileges, or immunities, or protection, named in the Constitution and secured by the laws for the protection of such rights, privileges, or immunities, and the constituted authorities of such State are unable to protect, or, from any cause, fail in or refuse protection of the people in such

rights, such facts shall be deemed a denial by such State of the equal protection of the laws to which they are entitled under the Constitution of the United States; and in all such cases, or whenever any such insurrection, violence, unlawful combination, or conspiracy opposes or obstructs the laws of the United States, or the due execution thereof, or impedes or obstructs the due course of justice under the same, it shall be lawful for the President, and it shall be his duty, to take such measures, by the employment of the militia or the land and naval forces of the United States, or of either, or by other means, as he may deem necessary, for the suppression of such insurrection, domestic violence, or combinations."[1]

Among the laws to be enforced under sections 5298 and 5299 are the following:

(1) Section 3995, Revised Statutes, which prohibits the obstructing or retarding the passage of the mail, and all other laws relating to the carrying of the mails.

(2) The following sections of an act approved July 2, 1890, entitled:

"AN ACT to protect trade and commerce against unlawful restraints and monopolies.

"SEC. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal.

"Every person who shall make any such contract or engage in any such combination or conspiracy shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

"SEC. 3. Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States, or of the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Territory or Territories and any State or States or the District of Columbia, or with foreign

[1] See United States v. Cruikshank, 92 U. S., 542; Virginia v. Rives, 100 U. S., 313; United States v. Harris, 106 U. S., 629, 639; Civil Rights Cases, 109 U. S., 3, 11; Baldwin v. Franks, 120 U. S., 692, 693.

nations, or between the District of Columbia and any State or States or foreign nations, is hereby declared illegal.

"Every person who shall make any such contract or engage in any such combination or conspiracy shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

(3) The following section of an act approved July 2, 1864, entitled:

"AN ACT granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget Sound, on the Pacific coast, by the Northern route.

"SEC. 11. *And be it further enacted,* That said Northern Pacific Railroad, or any part thereof, shall be a post route and a military road, subject to the use of the United States for postal, military, naval, and all other Government service, and also subject to such regulations as Congress may impose restricting the charges for such Government transportation."

(4) The following section of an act approved July 1, 1862, entitled:

"AN ACT to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and to secure to the Government the use of the same for postal, military, and other purposes. [The Union and Central Pacific Railway Companies.]

"SEC. 6. *And be it further enacted,* That the grants aforesaid are made upon condition that said company shall pay said bonds at maturity, and shall keep said railroad and telegraph line in repair and use, and shall at all times transmit dispatches over said telegraph line and transport mails, troops, and munitions of war, supplies, and public stores upon said railroad for the Government, whenever required to do so by any department thereof, and that the Government shall at all times have the preference in the use of the same for all the purposes aforesaid." * * *

(5) The following sections of an act approved July 27, 1866, entitled:

"AN ACT granting lands to aid in the construction of a railroad and telegraph line from the States of Missouri and Arkansas to the Pacific Coast.

"SEC. 11. *And be it further enacted,* That said Atlantic and Pacific Railroad, or any part thereof, shall be a post route and

military road, subject to the use of the United States for postal, military, naval, and all other Government service, and also subject to such regulations as Congress may impose restricting the charges for such Government transportation."

"SEC. 18. *And be it further enacted,* That the Southern Pacific Railroad, a company incorporated under the laws of the State of California, is hereby authorized to connect with the said Atlantic and Pacific Railroad, formed under this act, at such point near the boundary line of the State of California, as they shall deem most suitable for a railroad line to San Francisco, and shall have a uniform gauge and rate of freight or fare with said road; and in consideration thereof, to aid in its construction, shall have similar grants of land, subject to all the conditions and limitations herein provided, and shall be required to construct its road on the like regulations, as to time and manner, with the Atlantic and Pacific Railroad herein provided for."

"SEC. 5316. It shall be unlawful to take any vessel or cargo detained under the preceding section [sec. 5315] from the custody of the proper officers of the customs, unless by process of some court of the United States; and in case of any attempt otherwise to take such vessel or cargo by any force, or combination, or assemblage of persons, too great to be overcome by the officers of the customs, the President, or such person as he shall have empowered for that purpose, may employ such part of the Army or Navy or militia of the United States, or such force of the citizen volunteers, as may be necessary, to prevent the removal of such vessel or cargo, and to protect the officers of the customs in retaining the custody thereof."

GUANO ISLANDS.

"SEC. 5577. The President is authorized, at his discretion, to employ the land and naval forces of the United States to protect the rights of a discoverer (of a guano island), or of his widow, heir, executor, administrator, or assigns."

488. Officers of the Army will not permit troops under their command to be used to aid the civil authorities as a posse comitatus, or in execution of the laws, except as provided in the foregoing paragraph.

489. If time will admit, applications for the use of troops for such purposes must be forwarded, with statements of all material facts, for the consideration and action of the President; but in case of sudden and unexpected invasion, insurrection, or riot, endangering the public property of the United States, or in case of attempted or threatened robbery or interruption of the United States mails, or other equivalent emergency so imminent as to rerder it dangerous to await instructions requested through the speediest means of communication, an officer of the Army may take such action before the receipt of instructions as the circumstances of the case and the law under which he is acting may justify, and will promptly report his action and the circumstances requiring it to the Adjutant General of the Army by telegraph, if possible, for the information of the President.

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APPENDIX C.

[Governor Altgeld's protest against the use of United States troops in Illinois.]

EXECUTIVE OFFICE,
State of Illinois, July 5, [1894.]

Hon. GROVER CLEVELAND,
President of the United States, Washington, D. C.

DEAR SIR: I am advised that you have ordered Federal troops to go into service in the State of Illinois. Surely the facts have not been correctly presented to you in this case, or you would not have taken this step, for it is entirely unnecessary, and, it seems to me, unjustifiable. Waiving all questions of courtesy, I will say that the State of Illinois is not only able to take care of itself, but it stands ready to-day to furnish the Federal Government any assistance it may need elsewhere.

Our military force is ample, and consists of as good soldiers as can be found in the country. They have been ordered out promptly whenever and wherever they were needed. We have stationed in Chicago alone three regiments of infantry, one battery, and one troop of cavalry, and no better soldiers can be found. They have been ready every moment to go, and have been and are now eager to go into service. But they have not been ordered out, because nobody in Cook County, whether official or private citizen, asked to have their assistance, or even intimated in any way that their assistance was desired or necessary.

So far as I have been advised the local officials have been able to handle the situation. But if any assistance were needed, the State stood ready to furnish 100 men for every man required, and stood ready to do so at a moment's notice. Notwithstanding these facts, the Federal Government has been applied to by men who had political and selfish motives for wanting to ignore the State government. We have just gone through a long coal strike, more extensive here than in any other State, because our soft-coal field is larger than that of any other State; we have not had ten days of the railroad strike, and we have promptly furnished military aid wherever the local officials needed it.

In two instances the United States marshal for the southern district of Illinois applied for assistance to enable him to enforce the processes of the United States court, and troops were promptly furnished him and he was assisted in every way he desired. The law has been thoroughly executed, and every man guilty of violating it during the strike has been brought to justice. If the marshal for the northern district of Illinois or the authorities of Cook County needed military assistance, they had but to ask for it in order to get it from the State.

At present some of our railroads are paralyzed, not by reason of obstructions, but because they can not get men to operate their trains. For some reason they are anxious to keep this fact from the public, and for this purpose are making an outcry about obstructions in order to divert attention.

I will cite you two examples which illustrate the situation. Some days ago I was advised that the business of one of our railroads was obstructed at two railway centers—that there was a condition bordering on anarchy there, and I was asked to furnish protection so as to enable the employees of the road to operate the trains. Troops were promptly ordered to both points. Then it transpired that the company had not sufficient men on its line to operate one train. All the old hands were orderly but refused to go. The company had large shops in which worked a number of men who did not belong to the railway union, and who could run an engine. They were appealed to to run the train, but flatly refused. We were obliged to hunt up soldiers who could run an engine and operate a train.

Again, two days ago, appeals which were almost frantic, came from officials of another road, stating that at an important point on their lines trains were forcibly obstructed, and that there was a reign of anarchy at that place and that they asked for protection so that they could move their trains. Troops were put on the ground in a few hours' time, when the officer in command telegraphed me that there was no trouble and had been none at that point, but that the road seemed to have no men to run trains; and the sheriff telegraphed me that he did not need troops, but would himself move every train if the company would only furnish an engineer. The result was that the troops were there over twelve hours before a single train was moved, although there was no attempt at interference by anybody. It is true that

in several instances a road made efforts to work a few green men, and a crowd standing around insulted them and tried to drive them off, and in a few instances they cut off Pullman sleepers from the train. But all these troubles were local in character and could easily be handled by the State authorities. Illinois has more railroad men than any State in the Union, but as a rule they are orderly and well behaved.

This is shown by the fact that so very little actual violence has been committed. Only a very small per cent. of these men has been guilty of any infraction of the law. The newspaper accounts have in some cases been pure fabrications, and in others wild exaggeration.

I have gone thus into details to show that it is not soldiers that the railroads need so much as it is men to operate trains, and that the conditions do not exist here which bring the case within the Federal statute, a statute that was passed in 1861, and was in reality a war measure. This statute authorized the use of Federal troops in a State whenever it shall be impracticable to enforce the laws of the United States within such State by the ordinary judicial proceedings. Such a condition does not exist in Illinois. There have been a few local disturbances, but nothing that seriously interfered with the administration of justice, or that could not be easily controlled by the local or State authorities, for the Federal troops can do nothing that the State troops can not do.

I repeat that you have been imposed upon in this matter, but even if by a forced construction it were held that the conditions here came within the letter of the statute, then I submit that local self-government is a fundamental principle of our Constitution. Each community shall govern itself so long as it can and is ready and able to enforce the law, and it is in harmony with this fundamental principle that the statute authorizing the President to send troops into States must be construed. Especially is this so in matters relating to the exercise of the police power and the preservation of law and order.

To absolutely ignore a local government in matters of this kind, when the local government is ready to furnish any assistance needed, and is amply able to enforce the law, not only insults the people of the State by imputing to them an inability to govern themselves or unwillingness to enforce the law, but is in violation

of a basic principle of our institutions. The question of Federal supremacy is in no way involved. No one disputes it for a moment, but, under our Constitution, Federal supremacy and local self-government must go hand in hand, and to ignore the latter is to do violence to the Constitution.

As governor of the State of Illinois, I protest against this, and ask the immediate withdrawal of the Federal troops from active duty in this State. Should the situation at any time get so serious that we cannot control it with the State forces, we will promptly and freely ask for Federal assistance, but until such time I protest with all due deference against this uncalled-for reflection upon our people, and again ask the immediate withdrawal of these troops.

I have the honor to be yours, respectfully,

JOHN P. ALTGELD,
Governor of Illinois.

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